90-1297

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WALTER R. WEBSTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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February 6, 1991

QUESTIONS PRESENTED

WHETHER THE "CAUSE AND ACTUAL PREJUDICE" STANDARD SHOULD BE APPLIED TO ALL REQUESTS FOR RELIEF UNDER 28 U.S.C. SECTION 2255 ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL WHEN INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT RAISED ON APPEAL.

WHETHER A DEFENDANT'S CONVICTION UNDER 28 U.S.C. SECTION 848 SHOULD BE VACATED WHEN ONE OF THE FIVE DEFENDANTS NEEDED FOR CONVICTION UNDER 28 U.S.C. SECTION 848 (c)(2)(A) HAS HIS CONVICTION REVERSED BECAUSE OF LACK OF SUFFICIENT EVIDENCE TO CONVICT HIM.

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OPINIONS BELOW

The opinions of the Fourth Circuit Court of Appeals are reported at 639 F.2d 174 (4th Cir. 1981) and 669 F.2d 185 (4th Cir. 1982), the Memorandum opinion of the District Court for Maryland, and an unpublished opinion of the Fourth Circuit Court of Appeals, 90-6785 are attached as Appendix A, B, C, and D respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The **Sixth Amendment** to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defense. . . ."

28 U.S.C. Section 2255, states: A Prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the grounds that the sentence was imposed in violation of the Constitution or laws of the United States, or is otherwise subject to collateral attack, may move the court . . . to vacate, set aside or correct the sentence.

18 U.S.C. Section 1962(c), states: It shall be unlawful for any person employed . . . with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, . . .

STATEMENT OF THE CASE

Walter Webster (Webster) was among 17 defendants charged in a 35 count indictment by a Grand Jury for the District of Maryland on February 14, 1979. Webster was tried before a jury in April and May 1979. The jury returned its verdict on May 18, 1979 convicting Webster of conducting a continuing criminal enterprise (CCE), 21 U.S.C. Section 848; conducting the affairs of an enterprise through a pattern of racketeering, 18 U.S.C. Section 1961, 1962 (c), and 1963; conspiring to distribute heroin and cocaine, 21 U.S.C. Section 846; 17

counts of illegal use of the telephone, 21 U.S.C. Section 843 (b) and (c); and 3 counts of interstate travel in aid of racketeering enterprise, 18 U.S.C. Section 1952 (a) (3).

Webster was sentenced to Fifty (50) years imprisonment on the CCE conviction, Twenty (20) years on the RICO count, Thirty (30) years on the conspiracy count, Eight (8) years on the Seventeen (17) counts of unlawful use of the telephone, and Five (5) years each for the three (3) counts of interstate travel in aid of racketeering. The sentences were ordered to run concurrent to each other.

The defendant appealed to the Fourth Circuit Court of Appeals. *United States v. Webster*, 639 F.2d 174 (4th Cir. 1981), *cert. denied, Webster v. United States*, 456 U.S. 935 (1982). The Court affirmed one of the RICO convictions and directed that the defendant's conviction on Count 2 of the indictment relating to the defendant's conspiracy conviction under 21 U.S.C. Section 846 be stricken. 639 F.2d at 182. The Court affirmed all other convictions and sentences. The Court granted the defendant's request for a hearing en banc. *United States v. Webster*, 669 F.2d 185 (4th Cir. 1982). The Court reinstated the RICO conviction that it had previously stricken. The remaining aspects of the conviction remained unchanged.

The defendant filed a motion seeking relief under 28 U.S.C. Section 2255 in April of 1985. The motion was denied on June 5, 1986. The defendant appealed the denial of that motion on August 14, 1986. The appeal was untimely filed and on May 21, 1987 the Court dismissed it for lack of jurisdiction.

The defendant filed a motion seeking relief under 28 U.S.C. Section 2255. The motion was granted in part and

denied in part on December 4, 1989. A subsequent motion was denied.

REASONS FOR GRANTING THE WRIT

The Sixth Amendment to the United States Constitution guarantees a defendant to the assistance of counsel. This means the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759 (1970).

The defendant was convicted after a jury trial of multiple violations of the United States Criminal Codes including 18 U.S.C. Section 1962. In order for a defendant to be convicted under this statute the Government must prove that the criminal enterprise engaged in activities which affected interstate commerce. Counsel for the Defendant stipulated to this crucial element during trial. The prejudice from this act resulted in relieving the Government of the burden of proving this essential element, thus making it easier for the Government to convict the defendant, and the defendant's Sixth Amendment right to effective assistance counsel was abridged.

Webster failed to raise ineffective assistance of counsel when he appealed his convictions. He has recently raised this issue pursuant to a motion under 28 U.S.C. Section 2255 with the Fourth Circuit Court of Appeals. The Court denied relief holding that the defendant had failed to make a showing of cause and actual prejudice as required in *United States v. Frady*, 456 U.S. 152 (1982). In *Frady* the Court said that a defendant who collaterally attacks a sentence alleging ineffective assistance of counsel must show both (1) cause excusing his double procedural default, and (2) actual prejudice resulting from the errors of which he complains. This Court's decisions in *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Francis v. Henderson*, 425 U.S. 536 (1976); and *Davis v. United States*,

411 U.S. 233 (1973) reaffirm the long standing nature of this test. The facts in those cases are clearly different than this one. In this case the ineffective assistance was a stipulation by counsel mid-trial to an essential element of the offense that the Government may not have proved, and if not proven, the defendant could not have been convicted on the RICO Count. Counsel for the Defendant in the above-mentioned cases did not stipulate to an essential element of the criminal offense mid-trial. This was not a mere factual stipulation. It was an essential element of the crime charged in the RICO Count.

This Court should not apply the "cause" test in *Frady* when the actions complained of are so basic to effective representation that ineffective assistance should be presumed.

Webster alleges that stipulating to an essential element to the RICO charge was ineffective assistance of counsel, that this issue was not raised on appeal because the attorney who was ineffective at trial failed to raise this issue when he handled the appeal, and prejudice resulted because the stipulation was an asset to the Government but detrimental to the defendant who was already in trial.

The failure of this same counsel to raise this issue on appeal before the Fourth Circuit Court of Appeals and Webster's Petition for A Writ of Certiorari to this Court in 1982 effectively prevented the defendant from directly challenging his conviction. As a result the only remedy available to Webster is to collaterally attack his conviction. The standard of review is much more stringent when attacking the sentence on these facts thereby resulting in additional prejudice at the appellate level.

Webster also argued in his Section 2255 motion with the Fourth Circuit Court of Appeals and the United

States District Court for Baltimore, Maryland that his conviction for violation of 28 U.S.C. Section 848 (c) (2) (A) must be reversed. A defendant cannot be convicted under this statute unless it is proven that he supervised five or more persons. Herbert Leon Johnson was one of the five persons that Webster was convicted of supervising. Mr. Johnson's conviction for violating this section was reversed in *United States v. Webster*, 639 F.2d 174 (4th Cir. 1981), *cert. denied, Webster v. United States*, 456 U.S. 935 (1982) there the court said there was insufficient evidence to Johnson leaving only four (4) people for Webster to supervise. There being only four (4) people to supervise Webster's conviction must be reversed. *United States v. Casamento*, 887 F.2d 1141 (2nd Cir. 1989). The Fourth Circuit Court of Appeals' unpublished opinion and the opinion in the United States District Court for Baltimore, Maryland on Webster's Section 2255 motion did not address this issue even though it was argued by Counsel for Webster before both tribunals. The law is clear Webster's conviction for violation of 21 U.S.C. Section 848 (c) (2) (A) must be reversed.

SUPREME COURT PRECEDENT

In *United States v. Frady*, 456 U.S. 152 (1982) the Court held that the proper standard for review on a prisoner's Section 2255 motion seeking relief from errors at trial not objected to was the "cause and actual prejudice" standard governing relief on collateral attack following procedural default at trial. The Court did not decide the "cause" aspect of the case because it found that the defendant did not suffer any prejudice.

The cause and actual prejudice standard evolved in *Davis v. United States*, 411 U.S. 216 (1973). It was subsequently confirmed and extended in *Francis v. Henderson*, 425 U.S. 536 (1976) and *Wainwright v. Sykes*, 433 U.S. 72 (1977).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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February 6, 1991

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed to Solicitor General, Department of Justice, Washington, D.C., 20530, this 15th day of February, 1991.

R. Kenneth Mundy

APPENDIX A

UNITED STATES of America, Appellee,

v.

Walter R. WEBSTER, a/k/a Gangster, a/k/a Mr. G, Appellant.

UNITED STATES of America, Appellee,

v.

Walter R. WEBSTER, a/k/a Gangster; a/k/a Mr. G.; a/k/a G, Appellant.

UNITED STATES of America, Appellee,

v.

Richard ADAMS, a/k/a Mr. Richard, Appellant.

UNITED STATES of America, Appellee,

v.

Norma THOMPSON, Appellant.

UNITED STATES of America, Appellee,

v.

Boysie ASH, Appellant.

UNITED STATES of America, Appellee,

v.

Victoria WILLS, Appellant.

UNITED STATES of America, Appellee,

v.

John V. CHRISTIAN, a/k/a Wolf, Appellant.

UNITED STATES of America, Appellee,

v.

Herbert Leon JOHNSON, a/k/a Herb, Appellant.

Nos. 79–5204 and 79–5240 to 79–5246.

United States Court of Appeals, Fourth Circuit.

Argued July 7, 1980.

Decided Jan. 15, 1981.

Defendants were convicted on a wide variety of charges related to conspiracy to distribute illegal drugs, and they appealed from the United States District Court for the District of Maryland, at Baltimore, Joseph H. Young and Frank A. Kaufman, JJ. The Court of Appeals, Murnaghan, Circuit Judge, held that: (1) wiretaps were not shown to have been illegal; (2) a challenged part of the so-called "Kingpin" statute was not shown to be unconstitutional; (3) RICO provision making it unlawful for any person

employed by or associated with enterprise engaged in interstate or foreign commerce to conduct or participate in conduct of affairs of enterprise through pattern of racketeering activity or collection of unlawful debt does not by its language extend to situation where racketeering activities are advanced through assistance of an enterprise, and where operation of club was an ostensibly legal enterprise and government elected to charge that club was the "enterprise" whose affairs were furthered through pattern of racketeering activity, prosecution was required to prove that club had its affairs advanced or benefited in some fashion, direct or indirect, by pattern of racketeering activity; (4) District Court properly refused to admit polygraph evidence in a related nonjury trial of one defendant; and (5) evidence against particular defendant in light of supported conviction for possession or purchase of narcotics, but where nothing in tape-recorded conversations contradicted supposition that such defendant sought narcotics merely for his own personal use, he was not shown to be "heroin distributor" as indictment charged and where jury could have found actual purchase only by inference, there was insuf-

ficient evidence to support conviction for conspiracy to distribute.

Affirmed in part and reversed in part.

Kenneth L. Thompson, New York City (George L. Russell, Jr., Baltimore, Md., on brief), for appellant Adams.

Benjamin Lipsitz, Baltimore, Md., for appellant Johnson.

Harold I. Glaser, Baltimore, Md. (Lawrence A. Arch, Baltimore, Md., on brief), for appellants Webster and Thompson.

Howard L. Cardin, Baltimore, Md., on brief, for appellant Ash.

Mark Lee Phillips, Kensington, Md., on brief, for appellant Wills.

Stanley H. Miller, Baltimore, Md., on brief, for appellant Christian.

Glenn L. Cook, Asst. U. S. Atty., Baltimore, Md. (Russell T. Baker, Jr., U. S. Atty., Baltimore, Md., on brief), for appellee United States.

Before WINTER, BUTZNER and MURNAGHAN, Circuit Judges.

MURNAGHAN, Circuit Judge:

Appellants seek to overturn their convictions on a wide variety of charges related to a conspiracy to distribute illegal drugs. Of the many issues raised on appeal, the only ones requiring substantial discussion concern (a) the legality of certain wiretaps, (b) the constitutionality of part of 21 U.S.C. § 848, the so-called "Kingpin" statute, (c) the proper construction of 18 U.S.C. § 1962(c) (part of the Racketeer Influenced and Corrupt Organizations ("RICO") statute), (d) the propriety of the district court's refusal to admit polygraph evidence in a related nonjury trial of defendant Webster, and (e) the sufficiency of the evidence to convict appellants.

I.

Substantially all of the evidence in the trial consisted of either the contents or the fruits of wiretaps which were placed on telephones pursuant to *ex parte* orders issued on May 10, June 9, and June 21, 1978, by a judge of the Supreme Bench of Baltimore City. Defendants attack the statute under which the orders were issued, the sufficiency of the applications for the orders, and the propriety of playing tapes of

the intercepted calls to undercover informants who were cooperating with law enforcement officers.

A. *The Validity of the Maryland Statute*

Defendants spent substantial portions of their brief and argument attacking the validity of the Maryland statute under which, defendants stated, the order allowing the taps had been issued. According to defendants, that statute remained in effect through June 30, 1978, and deviated so much from the provisions of 18 U.S.C. §§ 2510–2520 (1976) that federal law barred the use as evidence of information obtained under the authority of the Maryland Act. *See* 18 U.S.C. § 2515 (1976); J. Carr, *The Law of Electronic Surveillance* 31–32 (1977). At argument, strangely enough, the United States attempted to support the challenged Maryland statute, although in its Brief the government had correctly pointed out that the statute which defendants were attacking had been replaced, effective July 1, 1977, with a statute which tracks the federal statute practically verbatim. *See* Md.Cts. & Jud.Proc.Code Ann. §§ 10–401 to –412 (1980). Since none of the wiretaps in this case had been ordered prior to May 10, 1978, defendant's federal consti-

tutional attack on the Maryland law (as well as on any claimed nonfulfillment of the requirement of compliance with the federal wiretap statute) represents no more than misdirected effort.

B. *Sufficiency of the Applications for the Taps and the Accompanying Affidavits*

[1] Both the federal and the Maryland wire interception statutes require an issuing judge to determine, on the basis of the application for the wiretap, that probable cause exists to believe that (1) an individual is committing, has committed, or is about to commit one of several offenses enumerated in Md.Cts. & Jud.Proc.Code Ann. § 10–406 or 18 U.S.C. § 2516 (1976) (both of which include dealing in narcotics), (2) particular communications concerning that offense will be intercepted by the wiretap, and (3) the target facilities will be used in connection with the offense. In addition, each statute requires (4) a showing either that normal investigative procedures were unsuccessful or reasonably appear to be unlikely to succeed if tried or to be too dangerous. *See* Md.Cts. & Jud.Proc.Code Ann. § 10–408(c)(1)–(4) (1980); 18 U.S.C. § 2518(3)(a)–(d) (1976). The defendants challenge the sufficiency of the applications

for the wiretaps in each of these respects. As Judge Young's Order denying the Motion to Suppress is thorough and well reasoned, our discussion can be substantially abbreviated.

1. Probable cause to believe that the targets had committed or were committing or about to commit certain offenses.

The affidavits on which the May 10, 1978 surveillance order was based are almost textbook examples of how to conform to the constitutional requirements articulated in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and in *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The expertise and credibility of both the affiants and the three informants are established in great detail, and the actual observations of the affiants and the informers are reported in even greater detail, enabling the neutral magistrate to form his or her own conclusions regarding the existence *vel non* of probable cause.

For instance, one target of the May 10, 1978 wiretap was heard taking the orders for drugs, another was seen exchanging

cocaine for stolen goods, a third was heard offering to sell cocaine and describing the large amounts he buys and sells, and a fourth was seen distributing cocaine. There were, therefore, ample grounds for the judge to have found probable cause that certain individuals had committed or were committing certain crimes. *See* Md.Cts. & Jud.Proc.Code Ann. § 10–408(c)(1) (1980); 18 U.S.C. § 2518(3)(a) (1976).

2. Probable cause with respect to the target phones.

[2] There was also probable cause to believe that the target telephones had been used in connection with the commission of the relevant offenses. For example, informants reported drug related conversations that had occurred on the Springdale Avenue telephone and on the West Baltimore Street telephone.

Defendants claim that, even conceding that the telephones had been used in connection with the offenses, there was insufficient grounds for probable cause to believe at the time of the surveillance order that the target phones were being used or were about to be used in connection with the

offenses. Defendants base this contention on two grounds. First, they assert that the substantial period of time which had elapsed between the actual observations regarding the target telephones and the subsequent request for the surveillance order removed the basis for believing narcotics sales continued. Second, defendants argue that the statements in the affidavit that the target individuals had begun to be suspicious that they were being observed by the police and had begun a variety of precautions served notice to the issuing tribunal that criminal activity "might have been" halted by the time the warrant was issued. Neither argument is valid.

We agree that otherwise reliable information which has become stale cannot provide the sole basis for a finding of probable cause. *See United States v. Harris*, 482 F.2d 1115, 1119 (3d Cir. 1973). However, the affidavit described numerous instances of both recent and continuing use of the target telephones to conduct illegal drug transactions. For instance, less than a month before the wiretap application, one informant reported overhearing two narcotics-related conversations originating from a target telephone. If the informant's obser-

vation had provided the single isolated basis of probable cause, perhaps then we would be called upon to determine whether such a showing complied with the staleness standard. However, the extensive drug business described in the affidavit indicated a continuing enterprise. Moreover, subsequent investigation conducted prior to the wiretap application provided additional confirmation that the target phones were used to conduct illegal drug business. For instance, long distance records subpoenaed from the telephone company and matched with Drug Enforcement Administration records containing telephone numbers of known or suspected drug traffickers resulted in three "hits." Where an affidavit "properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant." *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972). Therefore, neither the lapse of time nor the conceded suspicion of the target individuals was sufficient for the probability of continued inculpatory use of the phones to fall below the level required for probable cause.[1]

1. Counsel for the defendants quote the following sentence from the affidavit: "The persons

[3] The facts presented in the affidavit provided sufficient grounds for the judge to have found probable cause both that the sought-after communications would be obtained through the interception and that the target phones were facilities which were being and were about to be used in connection with the commission of narcotics offenses. *See* Md.Cts. & Jud.Proc.Code Ann. § 10–408(c)(2), (4) (1980); 18 U.S.C. § 2518(3)(b), (d) (1976). Assuming that the goal of the surveillance was to seek evidence regarding higher-ups in the drug distribution network, there is no basis for concluding that (as defendants argue) the judge issuing the order must find that there is probable cause to believe that the target phones will be used to talk *to* the higher-

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involved would not make use of the [target] telephones ... to conduct narcotics transactions." Relying on that sentence, defendants' counsel then urge that the court could not properly find probable cause that the target phones were being or were about to be used in connection with the commission of drug related crimes. What the affidavit states instead, however, is that there was a necessity not to give advance or contemporaneous notice of the electronic surveillance to the individuals about to be surveilled because, then, in that case the target phones would not be used in connection with any drug transactions.

ups. Both statutory and constitutional requirements are satisfied if the issuing judge finds that there was probable cause to believe that the target phones would be used to talk *about* those higher-ups. In fact, the affidavit contains ample grounds to believe that the phones would be used to talk both to and about those as yet unknown targets.

3. Sufficiency of the showing of exhaustion of alternative investigative techniques.

Defendants assert that the applicants for the wiretap orders failed adequately to show that alternative techniques of investigation had been tried and had failed or reasonably appeared to be unlikely to succeed if tried or to be too dangerous. Defendants stress as particularly promising but untried techniques: grand jury subpoenas and the threat of contempt against the informants, the threat of prosecution and the offer of immunity, infiltration by government agents, and physical searches of the "stash" houses pursuant to a warrant.

At the time of the wiretap application, conventional investigative techinques such as the use of informants had been attempt-

ed but had failed to provide significant information regarding the distributors' sources for the drugs. Moreover, the informants had refused to testify in court. Although the investigation had proceeded for months, surveillance had failed to expose the sources for the illicit traffic. The defendants' suggested techniques are by their nature speculative. There is nothing to negative the conclusion that normal investigative procedures reasonably appeared to be unlikely to succeed. Moreover, if those techinques had been tried and had failed, the as yet unidentified "higher-ups" targeted by the investigation would have been so alerted to law enforcement interest in their activities that the usefulness of any subsequent electronic surveillance would have been greatly diminished or destroyed.

4. The legality of the subpoenas served on the telephone company.

[4] The applications for the taps relied in part on data obtained from the telephone company pursuant to subpoenas issued by the Maryland State's Attorney. Defendants claim that such subpoenas, rather than grand jury subpoenas, may be used under state law only when the investigation is to be prosecuted by means of an information,

rather than an indictment,[2] and that such a mode of prosecution was exceedingly unlikely given the seriousness of the offenses involved in a narcotics investigation. Defendants, therefore, urge suppression of the fruits of the wiretaps, which were the fruits of the assertedly invalid subpoenas to the telephone company.

The difficulty with defendants' position is that it forces prosecutors to decide far too early in an investigation whether they will proceed by information rather than by indictment. During the early stages of an investigation, a State's Attorney may very well have intended to proceed by way of information, only to determine later that grand jury indictments were necessary. In such a situation we would be loath to foreclose prosecutors from utilizing documents subpoenaed under their statutory authority, at least where, as here, no purposeful abuse of the subpoena power has been shown.

5. The June 9 extension of the May 10 wiretap authorization.

[5] Defendants contend that the June 9,

2. Md.Ann.Code Art. 27, § 592A(a) (Supp.1979) provides in part: "The State's attorney may issue a summons for a witness for the purpose of obtaining evidence to prepare an information."

1978, extension of the May 10, 1978, wiretap order was flawed because, at the time of extension, the wiretap had already gathered evidence sufficient to demonstrate the existence of a conspiracy to violate narcotics laws. Thus, they claim, the purposes of the original order having been fulfilled, the extension was invalid. The point is frivolous. Nothing in the state wiretap statute prevents the use of a wiretap to obtain evidence regarding coconspirators whose existence is known or suspected and probable but whose identity is not known. The original wiretap order indicated that the tap was designed in part to gain evidence concerning such unidentified coconspirators, and the affidavit accompanying the application for an extension indicated that the goal had not yet been reached.

6. Suppression of the June orders as fruits of the initial wiretapping.

Defendants contend that if the May 10, 1978, order was invalid, then the results of the wiretapping pursuant to the two June orders would have been tainted also as the fruits of the original invalid order. Since the May order was in fact valid, the premise fail and, therefore, so does defendants' conclusion.

II.

[6] Defendants contend that, as compared with the population of persons eligible to be jurors in the District of Maryland, black persons were underrepresented on the jury that tried the defendants because black persons are inadequately represented in the jury wheel. Any objection to the composition of the jury was waived, however, because defendants first sought to raise it at a time subsequent both to the beginning of the voir dire examination and to a point seven days after they could have discovered the grounds for the challenge by the exercise of due diligence. *See* 28 U.S.C. § 1867(a) (Supp.1980); *United States v. Canty*, 422 F.2d 358, 360 (4th Cir. 1970) (per curiam), *cert. denied*, 409 U.S. 987, 93 S.Ct. 343, 34 L.Ed.2d 254 (1972). We therefore need not decide either whether defendants have made out a *prima facie* case of underrepresentation, *see Castaneda v. Partida*, 430 U.S. 482, 496 n.17, 97 S.Ct. 1272, 1281 n.17, 51 L.Ed.2d 498 (1977), or (if a *prima facie* case was made out) whether use of voting rolls as a source of names for the jury wheel rebuts the *prima facie* case, even if blacks are known to be inadequately represented on the voting rolls.

III.

Defendant Webster received a sentence of 50 years for his conviction of violating 21 U.S.C. § 848 (1976), a provision which is sometimes called "the kingpin statute" because it is designed to apply to ringleaders of large-scale illegal narcotics operations. In addition, Webster, along with defendant Thompson, was found guilty of violating 18 U.S.C. § 1962(c) (1976), part of the Racketeer Influenced and Corrupt Organizations ("RICO") statute. Finally, the jury convicted Webster of conspiracy to violate narcotics laws, 21 U.S.C. § 846 (1976), of eighteen counts for unlawful use of the telephone, 21 U.S.C. § 843(b) (1976), and of three counts charging interstate travel in aid of an unlawful activity, 18 U.S.C. § 1952(a)(3) (1970). He was sentenced to twenty years for the RICO conviction, thirty years for the conspiracy conviction, eight years for each of the unlawful use of the telephone convictions, and five years for each of the interstate travel convictions. All sentences were to run concurrently with the fifty-year sentence under § 848. The trial judge provided in the sentencing order that if convictions on all counts should be affirmed on appeal, he would set aside the sentences imposed for the telephone counts

"as merging into the greater sentence imposed under" the conspiracy count. A special parol term of fifteen years was imposed in addition to the term of imprisonment under § 848.

Webster attacks his sentences on a variety of grounds.

A. *The Propriety of the Jury Instructions Regarding § 848*

The provisions of 21 U.S.C. § 848(a) call for punishment of "[a]ny person who engages in a continuing criminal enterprise." A person is engaged in a continuing criminal enterprise if—

> (1) he violates any provision of [21 U.S.C. §§ 801–966] the punishment for which is a felony, and
>
> (2) such violation is part of a continuing series of violations of [21 U.S.C. §§ 801–966]—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(b).

Count 34 of the indictment charged Webster with the violation of § 848, alleging that he had transgressed 21 U.S.C. § 841(a)(1) (unlawful manufacture, distribution, dispensing, or possession with intent to manufacture, distribute, or dispense), 21 U.S.C. § 843(b) (unlawful use of the telephone), and 21 U.S.C. § 846 (conspiracy) "as alleged in Counts One [*sic*] through Counts Thirty-three [*sic*] of this Indictment which are incorporated herein by reference, which violations were part of a continuing series of violations . . . ."

[7] Count 1 charged violations of the RICO statute, viz. 18 U.S.C. §§ 1961, 1962(c), 1963. Counts 30 through 33 charged violations of 18 U.S.C. § 1952(a)(3) (interstate travel in aid of an unlawful activity), and 18 U.S.C. § 2 (aiding and abetting). None of those provisions are among the ones described in 21 U.S.C. § 848(b) as comprising a "continuing criminal enterprise."

In its instructions, the court incorrectly informed the jury that the violations of 18 U.S.C. § 1952(a)(3) could support conviction under § 848. The defendant did not complain of this aspect of the charge, and even if we consider the judge's instruction to be

plain error, nevertheless, we consider the error harmless. First, the substantive requirements needed to make out the interstate-travel charges required findings of a business enterprise involving violations of 21 U.S.C. § 841(a) and § 846, which are themselves within § 848. Second, the same jury convicted Webster of the conspiracy count and of eighteen telephone-use counts, all of which do lie within § 848. Thus, a plenitude of counts remain to support Webster's conviction under § 848.

B. *The Method of Giving Jury Instructions Regarding § 848*

[8] Webster contends that, in instructing the jury, the trial judge improperly repeated and highlighted the elements of a violation of 21 U.S.C. § 848 in reference to Webster. Reading the relevant portion of the instructions reveals, however, that the contention is frivolous. The judge employed a customary communicative and pedagogical technique of first providing an overview, then giving a summary, and finally adding the details. The purpose is to allow the listener to keep the context in mind when the details are presented, rather than becoming mired in a morass of unorganized minutia. It may have been to

Webster's disadvantage for the jury to have received the instructions concerning § 848 with such clarity, but that is not a disadvantage about which he may complain.

C. *"Substantial Income or Resources"*

[9] Webster argues that "in the context of this case" the phrase "substantial income or resources" used in § 848(b)(2)(B) is unconstitutionally vague and that, given its vagueness, there was insufficient evidence for the jury to have convicted him. Webster's argument, to say the least, curiously juxtaposes a constitutional "void for vagueness" challenge with an insufficiency of the evidence claim. However, although it might have been preferable for Congress to have used language somewhat more specific than "substantial income or resources," the unconstitutional-vagueness argument has been consistently rejected. *See, e. g., United States v. Valenzuela*, 596 F.2d 1361, 1368 (9th Cir. 1979), *cert. denied*, 444 U.S. 865, 100 S.Ct. 136, 62 L.Ed.2d 88 (1979) ("Finally, we see no fatal vagueness problem in the requirement that a criminal enterprise defendant must have received 'substantial income or resources' from his or her activity.

The criminal enterprise statute would have been valid even if Congress had omitted such a financial limitation. We see no reason to strike down the statute because Congress has chosen to provide some measure of protection to petty criminal enterprise defendants in this regard."); *United States v. Cravero*, 545 F.2d 406, 410–11 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100, 97 S.Ct. 1123, 51 L.Ed.2d 549 (1977) and 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977). We agree with those decisions.

[10] As for the insufficiency charge, given the quantity of drugs which were shown to have been moving in and out of Webster's possession, the jury would have been justified in concluding that he had received tens of thousands or even hundreds of thousands of dollars from his drug business. The evidence was thus more than sufficient for conviction.

D. *21 U.S.C. § 846 as a Lesser Included Offense under § 848*

Even though the sentences run concurrently, Webster challenges the propriety of being convicted under both § 846, the conspiracy count, and § 848 when the underlying transactions are the same. He argues

that § 846 is a lesser included offense of § 848 and that sentencing for both violates the double jeopardy clause of the Constitution.

Although at least two circuit courts of appeals have stated that § 846 is a lesser included offense of § 848, *see United States v. Stricklin*, 591 F.2d 1112, 1123 (5th Cir. 1979), *cert. denied*, 444 U.S. 963, 100 S.Ct. 449, 62 L.Ed.2d 375 (1979); *United States v. Sperling*, 560 F.2d 1050, 1055 (2d Cir. 1977), it is unnecessary that we decide the issue. At oral argument, counsel for the United States admitted that § 846 is a lesser included offense of § 848 and thus that the offenses merged. Accordingly, we hold that since Webster's sentence under § 848 will stand, his conviction under § 846 must be stricken.

IV.

Count 1 of the indictment charged defendants Webster and Thompson with violating 18 U.S.C. § 1962(c) (1976), part of the "Racketeer Influenced and Corrupt Organizations" ("RICO") statute, 18 U.S.C. §§ 1961–1968 (1976). Section 1962(c) forbids any person from conducting an enterprise's affairs through a pattern of racketeering activity. Defendants contend that

the evidence offered at trial is insufficient to convict them of the charge. Before passing to the merits of Webster and Thompson's claim, we will consider the government's suggestion that the "concurrent sentence" doctrine allows us to avoid confronting the substance of their contentions.

A. *The Concurrent Sentence Doctrine*

[11] The sentences imposed upon Thompson and Webster run concurrently with other sentences we hold valid. We may assume, for the purposes of this case, that under the "concurrent sentence" doctrine, it is permissible to affirm the convictions without investigating whether they were for some reason erroneous, provided we can foresee with reasonable certainty that no adverse collateral consequences will redound to the defendant. *United States v. Vargas*, 615 F.2d 952, 956–60 (2d Cir. 1980); *United States v. Lampley*, 573 F.2d 783, 788 (3d Cir. 1978). *See United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980) (Russell, J., concurring and dissenting); *Close v. United States*, 450 F.2d 152, 155 (4th Cir. 1971), *cert. denied*, 405 U.S. 1068, 92 S.Ct. 1513, 31 L.Ed.2d 799 (1972).

In this case, however, we find we cannot predict with certainty whether the RICO

convictions will at some future point work some unforeseen harm to the defendants. As the Supreme Court stated in *Benton v. Maryland*, 395 U.S. 784, 791 n.7, 89 S.Ct. 2056, 2061 n.7, 23 L.Ed.2d 707 (1969), "an attempt to impose collateral consequences after an initial refusal to review a conviction on direct appeal because of the concurrent sentence doctrine may well raise some constitutional problems." We refuse to place the risk of future collateral consequences upon the defendants. We prefer to follow the lead of the Eighth Circuit which, in circumstances similar to the present, recently exercised its discretion to review a RICO count "because of the possible stigma stemming from the connotations surrounding the offense of 'racketeering.'" *United States v. Anderson*, 626 F.2d 1358, 1361 n.2 (8th Cir. 1980). Therefore, exercising our discretion under the concurrent sentence doctrine, we elect to review the RICO convictions.

B. *The RICO Convictions*

[12] Defendant Webster, who was portrayed by the prosecution as the head of a major drug distribution network in Baltimore, lived with defendant Thompson, who owned and operated a business known as

the 1508 Club Tavern and Liquor Store. According to the prosecution, Webster participated in the operation of the 1508 Club, which in turn was used to facilitate the drug distribution operation. Evidence introduced at the trial tended to show that, by means of the telephone company's call-forwarding service, telephone calls to Webster's and Thompson's home telephone (which was tapped by court order) were frequently forwarded to the telephone at the 1508 Club; that Club facilities and personnel were used to accept and relay narcotics related messages; and that, on at least one occasion, a Club employee was asked by Webster to provide Club-owned drinks to one of Webster's narcotics customers who was waiting for drugs to be brought so that a transaction could take place.

The government charged Webster and Thompson under a RICO provision which states:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (1976).[3] The statute defines "enterprise" as any individual or group of associated individuals. *Id.* § 1961(4). Any federal offense involving dealing in narcotic or other dangerous drugs falls within "racketeering activity." *Id.* § 1961(1)(D). Two acts of racketeering activity within ten years of each other, at least one of which occurred after October 15, 1970, constitute a "pattern of racketeering activity." *Id.* § 1961(5).

Count One of the indictment charged Webster and Thompson with operating the 1508 Club enterprise through a pattern of racketeering activity, *i. e.*, the illegal drug activities. The evidence which the government has offered as sustaining the convictions under subsection (c) indicates that the facilities of the 1508 Club were regularly made available to, and put in the service of, the defendants' drug dealing business.

3. Section 1962(a) makes it unlawful for a person who has received income from a pattern of racketeering activity to use such income to acquire or operate any enterprise whose activities affect interstate commerce. Section 1962(b) forbids any person "through a pattern of racketeering activity" from acquiring an interest in or gaining control of such an enterprise. Although the evidence in the case might have sustained charges under subsections (a) and (b), the government indicted defendants for violating only subsection (c).

However, the evidence completely fails to demonstrate that the affairs of the 1508 Club were promoted in any way by the illegal drug racketeering. The prosecution might have attempted to prove that the business of defendants' bar was improved because people were attracted to it by the availability on the premises of illicit drugs. Yet it did not do so. To the contrary, the prosecution suggests in its Brief that the bar was not even a profit-making operation and that all benefit flowed in the opposite direction.

In response the government asserts that the statute requires only a "substantial nexus" between the racketeering and the conduct of the enterprise's affairs, regardless of which direction the assistance flows. The government contends that it is sufficient under § 1962(c) to show that the enterprise advances the interests of the racketeering activity.

However, the language of § 1962(c) contains no suggestion that Congress intended to reach situations in which the racketeering activity made use of the resources of the enterprise but did not provide the enterprise with any benefit, especially an illegitimate benefit, for that use. In the context of the instant case, § 1962(c) would prohibit

conducting the enterprise, the 1508 Club, through a pattern of racketeering activity, the illegal drug transactions. But, there is no evidence that by racketeering activity the affairs of the 1508 Club were conducted. Only the affairs of the drug dealing enterprise were promoted. Section 1962(c) simply does not by its language extend to a situation where the racketeering activities are advanced through the assistance of an enterprise.[4] The statute speaks solely of

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4. Since the government elected to charge that the 1508 Club was the "enterprise" whose affairs were furthered "through a pattern of racketeering activity," we need not determine whether the prosecution could have indicted the defendants for conducting the *drug business* (the statutory "enterprise") "through a pattern of racketeering activity." 18 U.S.C. § 1962(c).

It is to be noted that the 1508 Club was an ostensibly legal enterprise. Whether § 1962(c) permits indictment for conducting the affairs of an *illegal* enterprise through a pattern of racketeering activity is a question that has deeply divided the courts of appeals. *Compare, e. g., United States v. Turkette*, 632 F.2d 896 (1st Cir., 1980) and *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *with United States v. Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980) and *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). *See also United States v. Sutton*, 605

[footnote continued]

conduct of the affairs of the enterprise through racketeering. The evidence shows only conduct of the racketeering through the enterprise. Conducting the enterprise through racketeering is plainly not the same as conducting the racketeering through the enterprise. *See generally* Note, *Elliott v. United States, Conspiracy Law and the Judicial Pursuit of Organized Crime through RICO*, 65 Va.L.Rev. 109 (1979).

A reading of the statutory language—"to conduct such enterprise's affairs *through* a

F.2d 260, 97 S.Ct. 736, 50 L.Ed.2d 750 (6th Cir. 1979), *reversed en banc*, 642 F.2d 1001 (6th Cir., 1980) (5–4 decision). In a brief footnote in *U. S. v. Whitehead*, 618 F.2d 523, 525 n.1 (4th Cir. 1980), handed down prior to the decisions in two very recent circuit decisions (*Turkette, supra* and *Anderson, supra*), we indicated agreement with decisions permitting indictment for conducting an illegal enterprise's affairs through a pattern of racketeering.

However, the present case does not involve that controversy. Legal or illegal, the 1508 Club simply did not have its affairs conducted or promoted through a pattern of racketeering activity. Here, only the affairs of the drug enterprise, which the government did not elect to rely on in framing its § 1962(c) indictment (selecting the 1508 Club instead), were promoted. Hence, there is no occasion here for us to address the "legal enterprise" v. "illegal enterprise" issue.

pattern of racketeering activity"—supports our view that it is the enterprise's affairs which must be advanced by racketeering. The meaning of the word "through" suggests that, at least where the government elects to cast a § 1962(c) indictment in a form in which the "enterprise" is the legal or ostensibly legal activity, and not the racketeering activity itself, the statute should be applied in such a way as to punish where the racketeering activity advances the nonracketeering business but not where the only relation between the two consists of benefits which the racketeering activity derives from the nonracketeering enterprise.

In *United States v. Nerone*, 563 F.2d 836 (7th Cir. 1977), *cert. denied*, 435 U.S. 951, 98 S.Ct. 1577, 55 L.Ed.2d 801 (1978), defendants were charged with having run a casino gambling operation in the basement of a modular home located in a mobile home park which was operated by a corporation which was owned and run substantially by those conducting the casino and by their relatives. The Seventh Circuit reversed convictions under § 1962(c) because "the prosecuting team apparently assumed, but did not prove, that the affairs of the corporate enterprise charged in the indictment

were advanced through racketeering." 563 F.2d at 852. *Nerone* emphasized that

> the Congressional use of the word "through" in § 1962(c) was not intended to be meaningless. [Defendants] submit, correctly we think, that the most logical definitions to ascribe to that word as used in the statute are "by means of, in consequence of, by reason of."

Id. at 851. The court noted that the jury would have been able to infer from the evidence adduced that the racketeering activity had been "facilitated through the cover of a legitimate enterprise." *Id.* at 851. That inference, however, was insufficient to sustain a conviction under § 1962(c).

The proper construction of § 1962(c) was discussed in *United States v. Mandel*, 591 F.2d 1347, 1375 (4th Cir.), *vacated on other grounds by an equally divided court*, 602 F.2d 653 (4th Cir. 1979) (en banc) (per curiam), *petition for rehearing en banc denied by an equally divided court*, 609 F.2d 1076 (4th Cir. 1979), *cert. denied*, 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980). The *Mandel* panel determined that unless the word "through" was given meaning,

> anyone who used income from a legitimate business to participate in racketeer-

> ing activity would be guilty of a violation of § 1962(c). We do not believe Congress meant to sweep so broadly, especially in light of the mandatory forfeiture penalties for a § 1962 violation. 18 U.S.C. § 1963(a).

See also United States v. Anderson, supra, at 1366–67 n.13 (recognizing that the requirement that a defendant operate "through" a pattern of racketeering activity can pose substantive limitations on prosecutorial zeal in the setting of infiltration of legitimate business). Although the *Mandel* panel opinion is not binding upon us, still, to the extent of its persuasiveness, as with any legal dissertation, it is pertinent. The *Mandel* panel's interpretation of § 1962(c) supports our view that § 1962(c) requires more than merely some connection or even a "substantial nexus" between a lawful enterprise and the prohibited pattern of racketeering. Rather, the racketeering activities must be designed to further the business of the enterprise charged in the indictment.

In *United States v. Rubin*, 559 F.2d 975, 989–90 (5th Cir. 1977), *vacated and remanded on other grounds*, 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978), the Fifth Circuit affirmed a conviction in which the defend-

ant was charged with having embezzled union and employee-welfare-benefit-plan funds. *Rubin* concerned a narrow point which does not lend support to the government's position. The point turned on whether, under § 1962(c), a jury instruction had to highlight that the racketeering activity must aid the legitimate enterprise, rather than the other way around, by defining "through" as signifying "by means of." The decision was that use of "through" in the instruction, the very statutory word itself, made the instruction sufficient.

We, therefore, hold that the prosecution was required to prove that the "enterprise" (here, by choice of the government, the 1508 Club) had its affairs advanced or benefitted in some fashion, direct or indirect, by the pattern of racketeering activity. Since the evidence was insufficient to allow a conclusion that the pattern of racketeering had advanced the purposes of the bar in any way, Webster's and Thompson's convictions for violating § 1962(c) must be reversed.

V.

After the indictments in 79–5240 were handed down, an arrest warrant was prepared for Webster. According to the government, a search of Webster incident

to his arrest on the warrant revealed large quantities of illicit drugs. In a separate, nonjury trial (# 79–5204) Webster was convicted of violating 21 U.S.C. § 841(a)(1) (possession with intent to distribute heroin); 18 U.S.C. § 2 (aiding and abetting); and 21 U.S.C. § 844(a) (possession with intent to distribute cocaine). He was sentenced to one year for the conviction of possessing cocaine with intent to distribute and to thirty years for the heroin possession, both sentences to run concurrently with the terms in 79–5240. The court also imposed a special parole term of thirty-five years for the heroin possession, to run concurrently with the special parole term in 79–5240.

A. *Failure to Suppress*

In 79–5204 Webster contends that the drugs found in his possession at the time of arrest should have been suppressed as the fruits of illegal wiretaps. As we have indicated above, the wiretap orders, their supporting documents, and the underlying Maryland statute all pass statutory and constitutional muster. The challenged evidence of possession was, therefore, properly admitted.

B. *The Polygraph Issue*

[13] Webster's defense in the nonjury trial was that the arresting officers were lying. He testified that the drugs purportedly found on his person and in his car were not his, that despite a search at the moment of arrest, the drugs were not "found" until a second search back at the police station. During the search at the police station, according to Webster,

> the officer who had [Webster's] suit coat stated in a joking manner, ['']Hey, look what I found.['] In his hand he showed Mr. Webster an aluminum packet in a bag, and in another laughing statement he said [, ']We have to give the officer who shook you down while you were in the car a reprimand.['']

Concerned that his recent convictions in 79–5240 and a prior record, including a conviction for perjury, might impair his credibility, Webster elected a nonjury trial. He then offered to take a polygraph test before a qualified person selected by the prosecution, with the prosecution invited to participate and frame the questions, so long as the results could be admitted as evidence in the nonjury trial.

The prosecution refused to accede to the admission of any polygraph evidence what-

soever, and the district court upheld the prosecution's objection. "[If] I permitted the defendant to take a polygraph examination in this case and to put evidence of those results in, I would certainly give the government the same opportunity with regard to the law enforcement officials. I think that alone probably ends the polygraph consideration."

The question before us, of course, is not whether it would have been wrong had the district judge ruled the other way. The broad discretionary powers of the district judge perhaps would have made admission of polygraph evidence proper. On that point, it should be remembered that it was the defense not the prosecution who sought introduction and who agreed to be bound by the results even before the polygraph test was taken. Furthermore, the case was tried to the court, not to a jury, so the underlying fear that juries would be overly influenced by such evidence was not a factor here. Yet we are on the other side of the coin. A decision to deny polygraph evidence is also discretionary. *See United States v. Smith*, 552 F.2d 257, 260 n.3 (8th Cir. 1977). The judge here did not abuse his discretion in excluding polygraph evidence.

VI.

[14] Defendant Herbert Leon Johnson was convicted of one count for conspiracy to distribute or to possess with intent to distribute narcotics, in violation of 21 U.S.C. § 841(a)(1), and of two counts for using the telephone to cause or facilitate the commission of a felony offense, namely, conspiracy to distribute narcotics in contravention of 21 U.S.C. § 843(b). In the indictment, the government charged that Johnson was a heroin distributor for Webster and Thompson. Johnson contends that the evidence introduced against him by the government is insufficient to support his convictions.[5]

In a statement not contradicted by the government, Johnson argues that the evidence against him consisted substantially of the testimony of one witness, augmented by a series of drug-related taped telephone conversations to which Johnson was a party. The evidence may be summarized as

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5. Appellant Johnson also challenged the government's playing of wiretapped conversations to informants for the purpose of identifying his voice. Since we reverse Johnson's convictions on other grounds, we need not decide whether such use violates the wiretap statute. *See* 18 U.S.C. § 2515 (1970); Md.Cts. & Jud. Proc.Code Ann. § 10–405 (1980); *United States v. Rabstein*, 554 F.2d 190, 193 (5th Cir. 1977).

follows.[6] In the course of giving him drugs, the witness testified, Webster told him to see Johnson if he (the witness) could not find Webster. However, the witness also stated that he had never received any narcotics from Johnson. Moreover, there was no evidence that the witness ever discussed making a narcotics transaction with Johnson.

The wiretaps did reveal several drug-related conversations, including discussions concerning the purchase and sale of narcotics. On June 22, Webster told Johnson he would not sell an unspecified quantity of drugs to Johnson unless Johnson first paid

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6. In addition to the evidence abstracted in text, Johnson's name was mentioned in two taped conversations between other defendants. In the first call, during a drug-related conversation, one Moe says to Webster "this is different Johnson from that other, ain't it?" However, Agent Miller testified for the government that "Johnson" in this context referred to a narcotics package. In the second conversation, defendant Thompson merely reported to Webster that Johnson had telephoned.

Other testimony at trial revealed that Johnson and Webster lived two doors apart, that one witness formerly involved with Webster "knew of" Johnson, and that Webster once called Johnson to ask him to "walk over," and another time Johnson told Webster by phone he would "be ready later on."

for them. A government witness testified that other portions of the conversation demonstrated that Webster told Johnson he was "trying to get his narcotics" distribution together. Later that same day Johnson called back to ask what Webster would do for him if Johnson got a "tray" (three hundred dollars) together. Webster refused to sell Johnson "anything" (a package of narcotics) for less than $400. Two days later, on June 24, in a conversation between defendant Norma Thompson (who resided with Webster) and Johnson,[7] Thompson asked if Johnson had "something" (money) for Webster, in exchange for "these things" (drugs). In response, Johnson promised to "ride down there." During the evening of June 24th, Johnson again telephoned Webster to order a $100 package of "girls' suits" (cocaine). Later that same night, Johnson reported by phone that the "he" (heroin) was all right. In a conversation three days later, on June 27th, Johnson reported he had a "deuce" ($200) now but would not have another "deuce" until morning. Webster initially wanted "everything up top"

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7. The transcript of the tape attributed the call to defendant Norman George Johnson, but at trial Agent Miller testified the caller was actually Herb Johnson.

(all the money first), but apparently relented and agreed to see Johnson. The next day, on the 28th of June, Johnson called Webster to ask if his "sister" was home (if Webster had any cocaine) to which Webster demurred. Johnson then promised to see Webster "later on."

In the final conversation relevant here, on June 29th, Webster telephoned Norma Thompson to ask if "anybody" had called. During their conversation "Herb" (Johnson) was mentioned twice:

> NORMA: Yep, let me get my pad, Herb call [*sic*] and wanted to know if I had anything and I told him, he had to wait for you, Wolfe called two times and he said call him at home cause he's ready, Tommy said he's on his way over, I told him may by the time he get over probably he probably not heard from him cause he say wanted, wanted me to do something, I said wait and see you; Fat Moe said that let's see Fat Moe said that he would ah, he got your message that you called him last night and that he will bring the money over to me tomorrow...
>
> . . . . .
>
> NORMA: Where you at home?

WEBSTER: Yeah, I'm going to see Herb.

The question demanding our resolution is whether the evidence summarized above, viewed in a light most favorable to the government is sufficient to convict Johnson of conspiracy to distribute, or possession with intent to distribute narcotics. We conclude the evidence is not sufficient and therefore reverse Johnson's conviction under the conspiracy count. The evidence against Johnson might have supported a conviction for possession or purchase of narcotics. However, the government did not indict Johnson for possessing or purchasing drugs. Rather it charged him with unlawfully conspiring to distribute or to possess with intent to distribute narcotics. *See* 21 U.S.C. § 841(a). Even assuming that several of the taped conversations resulted in drug purchases by Johnson, nothing in the tapes or testimony contradicts the supposition that Johnson sought narcotics merely for his personal use. While the government may have proved that Johnson used drugs, it did not prove he was a "heroin distributor" as the indictment charged.

We have considered the fact that in less than a week Johnson engaged in several phone conversations concerning the pur-

chase of narcotics. From these conversations, the jury might have reasonably inferred that Johnson in fact purchased several hundred dollars worth of cocaine and heroin. However, proving use or purchase of narcotics is quite different from proving distribution or agreement to distribute. Particularly where, as here, the deduction that Johnson distributed or conspired to distribute drugs itself rests upon the assumption that Johnson actually purchased drugs from Webster, the inferential leap from purchase/user of such small quantities to distributor of them is too great to support a conviction for conspiracy to distribute.[8]

The June 29th call from Webster to Thompson admittedly reads like a list of

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8. The limitations on the efficacy of wiretapped conversations to prove guilt are evident in this case. It is literally impossible for a drug transaction to be completed over the telephone. Thus, where proof of guilt rests almost entirely on wiretaps, as in Johnson's case, the factfinder is required to infer not only that a defendant actually purchased narcotics, but also that he agreed to distribute them or in some way to participate in the conspiracy to distribute. Unless the government also produces evidence of actual transactions, it is often impossible fairly to conclude that a defendant did more than engage in suspicious-sounding negotiations.

messages from Webster's distributors, all of whom were charged with conspiracy at trial below. If the record contained additional evidence which conclusively linked Johnson to the co-conspirators, or which demonstrated Johnson actually distributed, we would be inclined to view this conversation as tending to support an inference of conspiracy to distribute. Standing alone, however, the conversation taints Johnson only because he is reported by Thompson to have telephoned the same day as Webster's dealers. Again, there is no proof Johnson telephoned for any other purpose than to chat or at most to supply his own habit. We decline to find guilt of distribution simply on the basis of association.

We recognize that intent to distribute may be inferred from the possession or purchase of large quantities of narcotics. *See United States v. Hutchinson*, 488 F.2d 484, 489 n.10 (8th Cir. 1973), *cert. denied*, 417 U.S. 915, 94 S.Ct. 2616, 41 L.Ed.2d 219 (1974) (possession of over eleven ounces of cocaine sufficient to justify inference); *United States v. Blake*, 484 F.2d 50, 58 (8th Cir. 1973), *cert. denied*, 417 U.S. 949, 94 S.Ct. 3076, 41 L.Ed.2d 669 (1974) (possession of heroin valued at $4,200 supports inference). However, where, as in this case, the

quantity and value of the assumed drug purchases are consistent with the maintenance of a personal habit, the government has not met its burden of proving guilt beyond a reasonable doubt. Therefore, defendant Johnson's conviction under the conspiracy count of the indictment must be reversed.

We have also concluded that Johnson's convictions for unlawfully using the telephone to cause or facilitate the commission of a felony offense, *see* 21 U.S.C. § 843(b) (1976), must be reversed. In drawing the indictment the government elected to identify the conspiracy charge as the "felony" committed by use of the telephone. Since we today reverse the conspiracy conviction the telephone use convictions must also fall.

VII.

[15] The evidence presented against Adams, Christian, and Wills was sufficient to identify and convict them. Some of the defendants other than Webster complain that refusal to sever their trials from Webster's impermissibly prejudiced them because the jury was unable to give them sufficiently individualized attention and because juxtaposition with Webster and Webster's alleged New York supplier (Adams)

made them seem like bigger-time distributors than they actually were. There is inherently present in every refusal to sever some theoretical disadvantage to the defendant. Yet it is within the trial judge's discretion to determine whether the actuality of prejudice exists sufficiently to outweigh the interests of judicial economy. *See* Fed.R.Crim.P. Rule 14; *United States v. McLaurin*, 557 F.2d 1064, 1075 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020, 98 S.Ct. 743, 54 L.Ed.2d 767 (1978).

VIII.

In light of *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), all of the special parole sentences except that imposed upon Walter Webster in No. 79–5204 should have been vacated. It is probable that such has been done, but the record before us does not disclose that action to vacate has been taken. To be on the safe side, we therefore order vacation of all of the special parole sentences except that imposed upon Walter Webster in No. 79–5204.

AFFIRMED IN PART, REVERSED IN PART.

APPENDIX B

UNITED STATES of America, Appellee,

v.

Walter R. WEBSTER, a/k/a Gangster, a/k/a Mr. G, Appellant.

UNITED STATES of America, Appellee,

v.

Walter R. WEBSTER, a/k/a Gangster, a/k/a Mr. G, a/k/a G, Appellant.

UNITED STATES of America, Appellee,

v.

Richard ADAMS, a/k/a Mr. Richard, Appellant.

UNITED STATES of America, Appellee,

v.

Norma THOMPSON, Appellant.

UNITED STATES of America, Appellee,

v.

Boysie ASH, Appellant.

UNITED STATES of America, Appellee,

v.

Victoria WILLS, Appellant.

UNITED STATES of America, Appellee,

v.

John V. CHRISTIAN, a/k/a Wolf, Appellant.

UNITED STATES of America, Appellee,

v.

Herbert Leon JOHNSON, a/k/a Herb, Appellant.

Nos. 79–5204 and 79–5240 to 79–5246.

United States Court of Appeals, Fourth Circuit.

Argued Oct. 9, 1981.

Decided Jan. 14, 1982.

Defendants were convicted on wide variety of charges relating to conspiracy to distribute illegal drugs, and they appealed from the United States District Court for the District of Maryland, at Baltimore, Joseph H. Young, J., and Frank A. Kaufman, Chief Judge, 473 F.Supp. 586. The Court of Appeals, Murnaghan, Circuit Judge, 639 F.2d 174 affirmed in part and reversed in part, and rehearing was sought. The Court of Appeals, Murnaghan, Circuit Judge, held

that: (1) under applicable statute, proper question was whether affairs of enterprise at issue were "conducted" through a pattern of racketeering activity and not whether they were benefited or advanced or whether profit to enterprise resulted, and (2) evidence was sufficient to support conviction.

As modified, affirmed.

On Rehearing

Henry Jay Myerberg, Baltimore, Md. (Harold I. Glaser, Lawrence A. Arch, George L. Russell, Jr., Kenneth L. Thompson, Howard L. Cardin, Benjamin Lipsitz, Baltimore, Md., Mark Lee Phillips, Stanley H. Miller, Baltimore, Md., on brief), for appellants.

David B. Smith (Russell T. Baker, Jr., U. S. Atty., Glenn L. Cook, D. Christopher Ohly, Asst. U. S. Attys., Baltimore, Md., on brief), for appellee.

Before WINTER, Chief Judge, and BUTZNER and MURNAGHAN, Circuit Judges.

MURNAGHAN, Circuit Judge:

Our earlier decision, in *United States v. Webster*, 639 F.2d 174 (4th Cir. 1981) has been set down for rehearing by the panel. The rehearing has concentrated on the interpretation we had made of 18 U.S.C. § 1962(c) (part of the RICO statute).

[1] The desire for variety should be indulged with caution and restraint when explaining the meaning and reach of a statute. It would have been far preferable had the earlier panel opinion adhered strictly to the language of 18 U.S.C. § 1962(c) which makes it unlawful for any person employed by or associated with an enterprise "to conduct or participate, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity." Unfortunately, we introduced "promoted", "improved", "advanced" and "benefitted", as practical synonyms for "conducted", influenced, no doubt, by the consideration that the enterprise, the 1508 Club Tavern and Liquor store, was organized for profit.

We simply overlooked that even businesses out to make money may conduct their affairs for other purposes. The problem in the approach we took immediately surfaces in cases where the enterprise is governmen-

tal in nature, and almost universally not organized for profit. *See United States v. Welch*, 656 F.2d 1039, 1061 (5th Cir. 1981).

The proper question should have been whether the affairs of the 1508 Club were *conducted* through the pattern of racketeering activity, not whether they were benefitted or advanced or whether profit to the 1508 Club resulted. "Conducted", it is true, signifies repeated, even patterned carrying on of affairs. It may be doubted that an isolated incident amounts to "conduct". Having made that observation, we are nevertheless satisfied that the answer to the "conduct" question must here be given in the affirmative. We have reviewed the record again, and are satisfied that we correctly stated its contents when we said:

> Evidence introduced at the trial tended to show that, by means of the telephone company's call-forwarding service, telephone calls to Webster's and Thompson's home telephone (which was tapped by court order) were frequently forwarded to the telephone at the 1508 Club; that Club facilities and personnel were used to accept and relay narcotics related messages; and that, on at least one occasion, a Club employee was asked by Webster to provide Club-owned drinks to one of

> Webster's narcotics customers who was waiting for drugs to be brought so that a transaction could take place.

United States v. Webster, 639 F.2d 174, 183 (4th Cir. 1981).

> The evidence which the government has offered as sustaining the convictions under subsection (c) indicates that the facilities of the 1508 Club were regularly made available to, and put in the service of, the defendants' drug dealing business.

Id. 184.

[2] Even if the single provision of refreshment did not constitute "conduct", the regular and repeated acceptance and relay of messages did. Accordingly, the convictions of Webster and Thompson under 18 U.S.C. § 1962(c) are affirmed, and the earlier opinion, published at 639 F.2d 174 is modified to that extent. In all other respects the earlier opinion remains undisturbed.

APPENDIX C

IN THE UNITED STATES OF AMERICA
FOR THE DISTRICT OF MARYLAND

WALTER R. WEBSTER

v. CIVIL NO. Y-88-3779
(CRIMINAL NO. Y-79-060)

UNITED STATES OF AMERICA

MEMORANDUM

Pending before this Court is a *pro se* motion by defendant Walter R. Webster to set aside sentence pursuant to 28 U.S.C. §§1651(a) and 2202, and defendant's supplemental motion to vacate and set aside sentence pursuant to 28 U.S.C. §2255. The government's answer and a reply brief by the defendant are also before the Court.

Webster was among 17 criminal defendants named in a 35-count indictment by the Grand Jury for the District of Maryland on February 14, 1979, and tried by this Court before a jury during April and May of 1979. On May 18, 1979, the jury returned its verdict convicting Webster of conducting a continuing criminal enterprise (CCE), 21 U.S.C. §848; conducting the affairs of the enterprise through a pattern of racketeering, 18 U.S.C. §§1961, 1962(c), and 1963; conspiracy to distribute cocaine and heroin, 21 U.S.C. §846; 17 counts of illegal use of the telephone, 21 U.S.C. §843(b) and (c); and 3 counts of interstate travel in aid of racketeering enterprise, 18 U.S.C. §1952(a) (3). 473 F. Supp. 586 (D. Md. 1979).

The Court sentenced Webster to a term of fifty (50) years imprisonment under the CCE conviction, Count 34

of the indictment, and sentenced him to a lesser term of imprisonment for each of the other counts of which he was convicted; the latter sentences to run concurrently with the 50-year sentence under Count 34. In addition to the term of imprisonment, the Court imposed a special parole term of fifteen (15) years.

As part of the conviction and sentencing order, this Court provided that if the convictions on *all* counts are affirmed on appeal, this Court will set aside the 17 counts of illegal use of the telephone "as merging into the greater sentence imposed under Count No. 2," (conspiracy to violate narcotics laws). 473 F. Supp. at 587.

On appeal, the Fourth Circuit affirmed Webster's conviction and sentences on all but two of the counts. *United States v. Webster*, 639 F.2d 174 (4th Cir. 1981),*cert. denied, Webster v. United States*, 456 U.S. 935 (1982). One of those two, the RICO conviction under 18 U.S.C. §1962(c) was eventually affirmed on rehearing by the same panel. The other count not affirmed on appeal was Count 2, the conspiracy conviction under 21 U.S.C. §846. During oral arguments, the government conceded to Webster's characterization of §846 as a lesser included offense within 21 U.S.C. §848 (CCE) when the underlying transactions are the same. The appellate panel, therefore, determined that Count 2 must be stricken. 639 F.2d at 182.

As his first prayer for relief, Webster invokes jurisdiction under 28 U.S.C. §§1651(a) and 2202 demanding that the sentence imposed under Count 2 of the indictment be stricken. The government concedes and this Court agrees that an order striking Count 2 is clearly required by the mandate of the Court of Appeals in the instant case. Defendant's first prayer for relief may properly be treated as a motion to correct the earlier order to

bring it into conformity with Part III(c) of the appeals court's opinion. 639 F.2d at 182. The convictions and sentence under the conspiracy charges in Count 2 will, accordingly, be stricken.

Webster next contends that an order setting aside the 17 counts of illegal use of the telephone is required by operation of a contingency contained in this Court's July, 1979 sentencing order providing for such relief if and when "all counts are affirmed on appeal." 473 F. Supp. at 587. This argument is wholly inconsistent with defendant's first interpretation of the mandate of the Fourth Circuit to the effect that Count 2 must be stricken. Obviously, *all* counts included in the sentencing order were not affirmed on appeal. The concurrent sentences under the 17 telephone counts will, therefore, remain undisturbed.

In his supplemental motion, defendant, this time through his attorney, brings four (4) additional challenges to the CCE and RICO convictions and sentences on grounds of insufficiency of the evidence and erroneous jury instructions. Supplemental motion to vacate, at 1-37. Defendant himself concedes that such challenges to the evidentiary basis supporting the verdict in this case should have been raised on direct appeal and that the failure to do so normally operates as a waiver of further direct challenges. Defendant's traverse in rebuttal to government's answer, at 7.

Defendant contends, however, that his failure to raise these evidentiary challenges on direct appeal was the result of ineffective assistance of his counsel and that:

> [i]t is precisely *that failure of counsel to raise the issues on direct* appeal, in addition to the plain error standard, that allows the defendant to raise these is-

> sues on collateral attack pursuant to 28 U.S.C. §2255. (emphasis in original).

Defendant's traverse, at 7.

In *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), the Supreme Court delineated the proper standard of review under a §2255 motion seeking collateral relief based on errors committed at trial and as to which no contemporaneous objection was made. The Court, per Justice O'Connor, held that the "plain error" standard of Criminal rule 52(b):

> was intended for use on direct appeal [and is] out of place when a prisoner launches a collateral attack against a criminal conviction after society's legitimate interest in the finality of the judgment has been perfected . . . by affirmance of the conviction on direct appeal.

Id. at 164. Instead of the "plain error" standard, the Court held that the "cause and actual prejudice" standard of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), was applicable to the determination of whether such direct challenges can be raised on collateral attack. In *Norris v. United States*, 687 F.2d 899 (7th Cir. 1982), the court extended the "cause and actual prejudice" standard to a determination of whether a constitutional issue, which has not been raised on direct appeal from a conviction, can be considered in a proceeding on a §2255 motion.

This Court finds defendant's attempt to establish the requisite "cause" under a §2255 motion by averring ineffective assistance of counsel is wholly without merit. Any prejudice resulting from a violation of the right to effective counsel must be treated on a distinct constitutional claim for relief. *See Brien v. United States*, 695 F.2d 10 (1st Cir. 1982). Accordingly, allegations of in-

effective assistance of counsel may not properly be used for the secondary purpose of establishing "cause" so as to afford defendant a second chance at appellate review of any and all issues that could have been raised during the direct appeal. Such an application of the "cause and actual prejudice" standard would clearly violate "society's legitimate interest in the finality of the judgment" of conviction. *Frady, supra*, at 164. Finding an absence of good cause supporting a collateral attack to the CCE and RICO convictions and sentences under 28 U.S.C. §2255, this Court will deny defendant's motions to vacate as to the four grounds which defendant himself admits could have been raised on appeal.[1]

Finally, Webster contends that his defense counsel was ineffective in his assistance *at trial* to cause him to be unconstitutionally convicted on the RICO charge, 18 U.S.C. §1962(c). Defendant refers to the two-prong standard of *Strickland v. Washington*, 466 U.S. 668 (1984), in arguing that his counsel's decision to stipulate that the 1508 Club was an enterprise engaged in activities affecting interstate commerce (an element of the RICO claim) deprived the jury of the opportunity to determine this issue resulting in an unconstitutional conviction. Defendant's supplemental motion at 55-56.

Again, the issue of whether or not Webster's counsel was ineffective at trial is one which was available to the defendant at the time of the direct appeal and may not properly be raised on collateral attack. Indeed, evidence

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[1] These grounds include defendant's contention that the evidence was insufficient to establish a conspiracy under 21 U.S.C. §848, that the trial judge's instructions to the jury were erroneous and prejudicial and that the jury was deprived of the opportunity to consider a factual element of the RICO offense due to an unauthorized stipulation to that element by defense counsel.

indicating ineffective assistance of counsel at trial tends to support the inference that defendant would have been aware that counsel's performance fell below objective standards by the time of the appeal to the Fourth Circuit. Thus, the ineffective assistance claims for purpose of a §2255 collateral attack in *Brien v. United States, supra*, and *United States v. Baynes*, 687 F.2d 659 (3d Cir. 1982), are distinguishable from the circumstances presented in the instant motion insofar as they were based on conflicts of interest not readily discernible at the trial or appellate proceedings.

A review of the entire record in this case re-affirms this Court's impression that defendant Webster received the assistance of a highly experienced criminal defense attorney whose representation in the instant case has met the recognized standards of quality and effectiveness. Webster's motion to vacate based on ineffective assistance of counsel will, accordingly, be denied.

/s/ [Illegible]

Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WALTER R. WEBSTER

v. CIVIL NO. Y-88-3779
(CRIMINAL NO. Y-79-060)

UNITED STATES OF AMERICA

ORDER

In accordance with the attached Memorandum, it is this day of December, 1989, by the United States District Court for the District of Maryland, ORDERED:

1. That defendant's motion to correct the July 13, 1979, Commitment and Sentencing Order in the above case thereby striking the conviction and sentence under Count 2 of the indictment BE, and the same IS, hereby GRANTED;

2. That defendant's motion to vacate and set aside the sentences imposed as to each of counts numbers 4, 5, 6, 8, 11, 13, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, and 27 BE, and the same IS, hereby DENIED;

3. That defendant's supplemental motion to vacate and set aside sentence pursuant to 28 U.S.C. § 2255 BE, and the same IS, hereby DENIED; and

4. That a copy of this Memorandum and Order be mailed to the petitioner and counsel for the United States of America.

/s/ [Illegible]

Senior United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-6784

UNITED STATES OF AMERICA,

Plaintiff - Appellee

versus

WALTER R. WEBSTER, a/k/a Gangster,
a/k/a Mr. G, a/k/a G,

Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, Senior District Judge. (CR-79-60-Y, CA-88-3780-Y)

Argued: October 5, 1990 Decided: November 8, 1990

Before WIDENER and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ARGUED: R. Kenneth Mundy, Washington, D.C., for Appellant. Richard Charles Kay, Assistant United States

Attorney, Baltimore, Maryland, for Appellee. *ON BRIEF:* Breckinridge L. Willcox, United States Attorney, Geoffrey R. Garinther, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Appellant brought this action under 28 U.S.C. § § 1651, 2202 and 2255 seeking to set aside and vacate certain criminal sentences imposed following his May 1979 convictions of conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848, conducting the affairs of the enterprise through a pattern of racketeering in violation of 18 U.S.C. § § 1961, 1962(c), and 1963, conspiracy to distribute cocaine and heroin in violation of 21 U.S.C. § 846, 17 counts of illegal use of the telephone in violation of 21 U.S.C. § 843(b) and (c), and three counts of interstate travel in aid of a racketeering enterprise in violation of 18 U.S.C. § 1952(a) (3). As a part of the conviction and sentencing order, the district court provided that it would set aside the 17 counts of illegal use of the telephone as having merged into the greater sentence imposed under Count 2, the conspiracy count. On appeal (*United States v. Webster*, 639 F.2d 174 (4th Cir. 1981), *cert. denied*, 456 U.S. 935 (1982)), all convictions were affirmed except the conspiracy conviction under Count 2. It appears that the conviction on Count 2 has never been stricken as directed by our opinion in 1981, and in the present proceeding the district court directed the record to be corrected and this conviction stricken. However, the district court denied Webster's further request that the 17 convictions of illegal use of the telephone be

set aside. There is no merit to appellant's claim of error as to these 17 convictions. The district court at sentencing clearly provided that the telephone convictions would be vacated if the conspiracy count was affirmed. However, since the conspiracy count was not affirmed, appellant is not entitled to be relieved of the convictions.

Appellant also attempted to raise challenges to the sufficiency of the evidence and erroneous jury instructions to his CCE and RICO convictions and claims that his failure to raise these exceptions on direct appeal was the result of ineffective assistance of counsel. However, he has failed to make a showing of cause and actual prejudice as required by *United States v. Frady*, 456 U.S. 152 (1982). Ineffective assistance of counsel may not be used to establish cause under the *Frady* test.

The district court considered the ineffective assistance of counsel claim and found that appellant had not met the burden imposed by *Strickland v. Washington*, 466 U.S. 668 (1984), and we find no error in this ruling.

AFFIRMED

Supreme Court, U.S.
FILED
MAY 13 1991
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(2)

No. 90-1297

In the Supreme Court of the United States

OCTOBER TERM, 1990

WALTER R. WEBSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioner is entitled to relief under 28 U.S.C. 2255 based on a claim of ineffective assistance of counsel that he failed to make in an earlier petition under 28 U.S.C. 2255.

2. Whether under 28 U.S.C. 2255 petitioner may challenge the sufficiency of evidence supporting his conviction for conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848, after unsuccessfully making that challenge on direct appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1297

WALTER R. WEBSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 61a-63a) is unreported, but the decision is noted at 917 F.2d 1302 (Table). The opinion of the district court (Pet. App. 54a-59a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1990. The petition for a writ of certiorari was filed on February 6, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of

conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848; racketeering, in violation of 18 U.S.C. 1961, 1962(c), and 1963; conspiring to distribute cocaine and heroin, in violation of 21 U.S.C. 846; using a telephone to facilitate narcotics violations, in violation of 21 U.S.C. 843(b) and (c); and travelling in interstate commerce in aid of a racketeering enterprise, in violation of 18 U.S.C. 1952(a)(3). He was sentenced to a total of 50 years' imprisonment.

The convictions arose out of petitioner's activities as the leader of a major drug distribution network in Baltimore, Maryland. Petitioner and co-defendant Norma Thompson operated a business known as the 1508 Club Tavern and Liquor Store that served as the headquarters of the drug distribution enterprise. *United States* v. *Webster*, 639 F.2d 174, 183 (4th Cir. 1981), cert. denied, 456 U.S. 935 (1982).

2. On appeal, petitioner's convictions were affirmed, except that the conspiracy conviction under 21 U.S.C. 846 was vacated on the ground that it was a lesser included offense of 21 U.S.C. 848, the continuing criminal enterprise charge. *Webster*, 639 F.2d at 182.

3. In April 1985, petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255. On June 5, 1986, the district court denied the motion. Petitioner filed an untimely notice of appeal. The court of appeals dismissed the appeal for lack of jurisdiction. See Government Answer to Section 2255 Motion at 6 (June 5, 1989).

4. On April 13, 1989, petitioner filed another motion under 28 U.S.C. 2255 challenging his convictions. In that motion, petitioner raised four challenges to the continuing criminal enterprise (CCE) and RICO convictions, alleging that they were based on insufficient evidence and erroneous jury instructions. Petitioner also claimed that he had not received effective assistance of counsel at trial and on

appeal. The district court rejected those claims and denied the motion.

The court held that petitioner waived his four challenges to the CCE and RICO convictions by failing to raise them on direct appeal. The court observed that petitioner conceded that these challenges should have been raised on direct appeal. Pet. App. 56a. Petitioner contended, however, that the challenges could be raised in a collateral attack because the failure to raise them on appeal had resulted from the ineffective assistance of counsel. The court rejected that contention.

The court determined that the "cause and actual prejudice" standard enunciated in *United States* v. *Frady*, 456 U.S. 152 (1982), and *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), governed "the determination of whether such direct challenges can be raised on collateral attack." Pet. App. 57a. The court then determined that claims of ineffective assistance of counsel may not be used to establish "cause" under that standard. "Any prejudice resulting from a violation of the right to effective counsel must be treated on a distinct constitutional claim for relief." *Ibid.* A claim of ineffective assistance "may not properly be used for the secondary purpose of establishing 'cause' so as to afford defendant a second chance at appellate review of any and all issues that could have been raised during the direct appeal." *Id.* at 57a-58a. To hold otherwise "would clearly violate 'society's legitimate interest in the finality of the judgment' of conviction" (*id.* at 58a (quoting *United States* v. *Frady*, 456 U.S. at 164)). The court accordingly denied petitioner's motion to vacate "as to the four grounds which [petitioner] himself admits could have been raised on appeal." Pet. App. 58a.

The court then rejected petitioner's claims of ineffective assistance of counsel on the merits. The court recognized that those claims were governed by *Strickland* v.

Washington, 466 U.S. 668 (1984). Pet. App. 58a. Based on a "review of the entire record in this case," the court concluded that "[petitioner] received the assistance of a highly experienced criminal defense attorney whose representation in the instant case has met the recognized standards of quality and effectiveness." *Id.* at 59a.

5. The court of appeals affirmed. The court agreed (Pet. App. 63a) that petitioner had "failed to make a showing of cause and actual prejudice as required by *United States* v. *Frady*, 456 U.S. 152 (1982)." The court further held that "[i]neffective assistance of counsel may not be used to establish cause under the *Frady* test." Pet. App. 63a. As to petitioner's claims of ineffective assistance of counsel, the court found "no error" in the district court's conclusion that "[petitioner] had not met the burden imposed by *Strickland* v. *Washington*." *Ibid.*

ARGUMENT

1. Petitioner renews his contention (Pet. 4-5) that he was deprived of his Sixth Amendment right to effective assistance of counsel. He argues (Pet. at 5) that the ineffective assistance consisted of "a stipulation by counsel mid-trial to an essential element of the [RICO] offense that the Government may not have proved," namely that the 1508 Club was an enterprise engaged in activities that affected interstate commerce. The courts below correctly refused to grant relief on this basis under 28 U.S.C. 2255.

First, petitioner's motion under 28 U.S.C. 2255 constitutes an abuse of the writ under this Court's recent opinion in *McCleskey* v. *Zant*, No. 89-7024 (Apr. 16, 1991). Petitioner filed an earlier motion under 28 U.S.C. 2255 that the district court denied; petitioner took an untimely appeal from that ruling, which was properly dismissed by the court of appeals. Petitioner does not explain why he could not have

raised his claim of ineffective assistance of counsel in the earlier motion and appealed any adverse ruling in a timely fashion. Petitioner's unexplained failure to do so bars relief under *McCleskey* v. *Zant*.

Second, petitioner's claim of ineffective assistance of counsel is without merit in any event. The district court rejected that claim based on a review of the entire record, Pet. App. 59a, and the court of appeals found no error in the district court's determination, *id.* at 63a. Petitioner provides no basis for setting aside the lower courts' holdings.

Competent counsel frequently stipulate to particular issues on which the evidence is not subject to dispute and which do not affect the theory of defense. The fact that the issue is an element of the offense does not make it improvident for counsel to stipulate to the issue.

Petitioner does not suggest any reason why the stipulation in this case was improper. He does not contend that the issue was one on which counsel could have mounted an effective defense. Rather, his claim is simply that the government may not have been able to prove the element of interstate commerce, and that if proof of that element had failed, petitioner would have been entitled to acquittal on the racketeering count (Pet. 5). The interstate commerce element is not an exacting one, however, and in light of the fact that the racketeering enterprise was a tavern and liquor store, it is inconceivable that counsel could have mounted an effective defense on the theory that the enterprise was not engaged in interstate commerce. There is therefore no reason to believe that counsel's decision to stipulate on that issue denied petitioner the effective assistance of counsel.

2. Petitioner also renews his contention (Pet. 5-6) that there was insufficient evidence to support his conviction under 21 U.S.C. 848. Petitioner argues that the evidence was sufficient only to show that he supervised four persons,

not five persons, as required for the offense. That argument does not warrant further review.

On direct appeal, the court of appeals rejected petitioner's challenge to the sufficiency of evidence supporting his conviction under ~~28~~ 21 U.S.C. 848. *Webster*, 639 F.2d at 181. Petitioner does not explain why further review of that challenge would be appropriate.[1] Nor does petitioner explain why he did not timely pursue that argument in his previous 2255 petition. In any case, the evidence at trial showed conclusively that, even without counting Herbert Leon Johnson, petitioner supervised many more than five persons. See Government Answer to Section 2255 motion at 14-20 (June 5, 1989). Further review of petitioner's fact-bound claim is unwarranted.

---

[1] To the extent petitioner claims that his attorney improperly failed to raise the specific argument regarding the sufficiency of the evidence raised here, the court of appeals properly held (Pet. App. 63a) that "[i]neffective assistance of counsel may not be used to establish cause under the *Frady* test." As the district court reasoned, "allegations of ineffective assistance of counsel may not properly be used for the secondary purpose of establishing 'cause' so as to afford defendant a second chance at appellate review of any and all issues that could have been raised during the direct appeal" (Pet. App. 58). Such "an application of the 'cause and actual prejudice' standard would clearly violate 'society's legitimate interest in the finality of the judgment' " (Pet. App. 58a (quoting *United States* v. *Frady*, 456 U.S. 152, 164 (1982)).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
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Attorney

MAY 1991

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(3)

No. 90-1297

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WALTER R. WEBSTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Counsel for Petitioner.

May 29, 1991

QUESTIONS PRESENTED

WHETHER THE "CAUSE AND ACTUAL PREJUDICE" STANDARD SHOULD BE APPLIED TO ALL REQUESTS FOR RELIEF UNDER 28 U.S.C. Section 2255 ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL WHEN INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT RAISED ON APPEAL.

WHETHER A DEFENDANT'S CONVICTION UNDER 21 U.S.C. SECTION 848 SHOULD BE VACATED WHEN ONE OF THE FIVE DEFENDANTS NEEDED FOR CONVICTION UNDER 21 U.S.C. SECTION 848(c)(2)(A) HAS HIS CONVICTION REVERSED BECAUSE OF LACK OF SUFFICIENT EVIDENCE TO CONVICT HIM.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-1297

WALTER R. WEBSTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

OPINIONS BELOW

The opinions of the Fourth Circuit Court of Appeals are reported at 639 F.2d 174 (4th Cir. 1981) and 669 F.2d 185 (4th Cir. 1982), the Memorandum opinion of the District Court for Maryland, and an unpublished opinion of the Fourth Circuit Court of Appeals, 90-6785 are attached as Appendix A,B,C, and D to Petitioner's Petition for Certiorari.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on November 8, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Walter Webster (Webster) was among 17 defendants charged in a 35 count indictment by a Grand Jury for the District of Maryland on February 14, 1979. Webster was tried before a jury in April and May 1979. The jury returned its verdict on May 18, 1979 convicting Webster of conducting a continuing criminal enterprise (CCE), 21 U.S.C. Section 848; conducting the affairs of an enterprise through a pattern of racketeering, 18 U.S.C. Section 1961, 1962 (c), and 1963; conspiring to distribute heroin and cocaine, 21 U.S.C. Section 846; 17 counts of illegal use of the telephone, 21 U.S.C. Section 843 (b) and (c); and 3 counts of interstate travel in aid of racketeering enterprise, 18 U.S.C. Section 1952 (a) (3).

Webster was sentenced to Fifty (50) years imprisonment on the CCE conviction, Twenty (20) years on the RICO count, Thirty (30) years on the conspiracy count, Eight (8) years on the Seventeen (17) counts of unlawful use of the telephone, and Five (5) years each for the three (3) counts of interstate travel in aid of racketeering. The sentences were ordered to run concurrent to each other.

The defendant appealed to the Fourth Circuit Court of Appeals. *United States v. Webster*, 639 F.2d 174 (4th Cir. 1981), *cert. denied*, *Webster v. United States*, 456 U.S. 935 (1982). The Court of Appeals affirmed one of the RICO convictions and directed that the defendant's con-

viction on Count II of the indictment relating to the defendant's conspiracy conviction under 21 U.S.C. Section 846 be stricken. The Court affirmed all other convictions and sentences. The Court granted the defendant's request for a hearing en banc. *United States v. Webster*, 669 F.2d 185 (4th Cir. 1982). The Court reinstated the RICO conviction that it had previously stricken. The remaining aspects of the conviction remained unchanged.

The defendant filed a motion seeking relief under 28 U.S.C. Section 2255 on April 22, 1985. The motion was denied on June 5, 1986 without a hearing. The defendant appealed the denial of that motion on August 14, 1986. The appeal was dismissed on May 21, 1987 for lack of jurisdiction because the notice of appeal was untimely filed.

On April 22, 1985 the defendant filed a motion seeking relief under 28 U.S.C. Section 2255. The motion was granted in part and denied in part on December 4, 1989. The defendant filed a Motion to Reconsider that Memorandum and Order of the United States District Court for Maryland. The motion was denied without an opinion. The defendant then filed a timely notice of appeal of the December 4, 1989 order.

ARGUMENT

The Respondent's Brief in Opposition discusses three points, First that the Petitioner has abused the writ available under 28 U.S.C. Section 2255, Second, Petitioner has failed to met the test in *United States v. Frady*, 456 U.S. 152 (1982 and third, that Petitioner's argument that his conviction under 21 U.S.C. Section 848 (c) (2) (A) should be reversed does not warrant further review.

ABUSE OF WRIT

The Respondent argues that the Petitioner's motion under 28 U.S.C. Section 2255 filed on April 13, 1989 constitutes an abuse of the writ under this Court's opinion in *McCleskey v. Zant* 111 S.Ct. 1454 (1991). (Resp. Brief 4-5) A petitioner who files successive motions under 28 U.S.C. Section 2255 must explain why the new claim is not an abuse only after the Government has pleaded with particularity the abuse. *Sanders v. United States* 373 U.S. 1 (1963) *Price v. Johnston*, 334 U.S. 266 (1948); *McCleskey v. Zant*, supra. This argument was not part of the Respondent's Brief to the Fourth Circuit Court of Appeals (Reply Brief App. A) and that Court did not address that issue in its decision. (Reply Brief. App. C) Any argument that the Respondent had with reference to abuse of the writ against the Petitioner was waived by their failure to assert it below. Even if this Court's mandate in *McCleskey* was applied to the facts of this case the court would entertain the motion under the ends of justice exception discussed in *McCleskey*. Under the exception this Court would consider the petition if a fundamental miscarriage of justice would result by not considering it. The exception is a safeguard against continued incarceration of a man whose convictions should be reversed. *McCleskey v. Zant*, supra, citing from *Stone v. Powell*, 428 U.S. 492-493 (1976).

The Petitioner's first motion under 28 U.S.C. Section 2255 was filed on April 22, 1985 after the decision in *United States v. Webster*, 639 F.2d 174 (4th Cir. 1981) cert. denied, *Webster v. United States*, 456 U.S. 935 (1982) reversing the conviction of Herbert L. Johnson (Johnson) leaving only four (4) people who could qualify under 21 U.S.C. Section 848 (c) (2) (A) as being supervised by the Petitioner in order to sustain a conviction

against him. The motion was denied and Petitioner appealed. On May 21, 1987 the appeal was dismissed as being filed untimely. The Petitioner filed a second motion under 28 U.S.C. Section 2255 on December 16, 1988. The motion was supplemented on April 17, 1989. The Court granted the motion in part and denied it in part on December 9, 1989. The Petitioner appealed the denial to the Fourth Circuit Court of Appeals.

The Petitioner argued to the Fourth Circuit Court of Appeals that as a result of the reversal of Johnson's convictions under 21 U.S.C. Section Section 841 (a) (1) and 21 U.S.C. Section 843 (b) his convictions were unconstitutional and illegal. (Reply Brief App. B, pp. 36a-40a) The Court of Appeals ignored in its opinion the constitutional issue raised by the Petitioner (Reply Brief App. C) and which was opposed by the Government. (Reply Brief App. A) The failure of the Court of Appeals to address this issue is plain error that can only be remedied by granting the writ of certiorari. *Smith v. Digmon*, 434 U.S. 332 (1978).

INEFFECTIVE ASSISTANCE OF COUNSEL

The Respondent's second argument is that the Petitioner's ineffective assistance claim was properly denied. Respondent argues that competent counsel frequently stipulate during trial and in any case Counsel could not have mounted an effective defense against the theory that the 1508 Club was engaged in interstate commerce. The Respondent misses the point. There is no need to stipulate to an essential element of the Government's case if you are mid-trial making the Government prove its burden. The stipulation was tantamount to an admission of guilt. The issue of whether the 1508 Club was involved in interstate commerce was such a nebulous issue that the

Fourth Circuit Court of Appeals initially found that the Government's evidence failed to demonstrate that the 1508 Club had its affairs advanced, or benefitted, in some fashion, direct or indirect, by the pattern of racketeering mentioned in the statute. Counsel's stipulation made it easier for the Government to convict the Petition on an essential element of the offense for which the Government's evidence was questionable.

The Petitioner maintains his position that this Court should not apply the "cause" test in *Frady* when the actions complained of are so basic to effective representation that ineffective assistance should be presumed. The complained of stipulation mid-trial is one of those instances when ineffective assistance should be presumed.

CONVICTION UNDER 21 U.S.C. SECTION 848 (c) (2) (A)

The Respondent's third point is that the Petitioner's argument that with the reversal of Johnson's convictions there are only four (4) of the required five (5) people under the statute to sustain Petitioner's conviction does not warrant further review because the evidence is that the Petitioner supervised more than five (5) person. The Respondent misses the point of the statute. The statute requires the five (5) persons fall within the following category:

> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

There is no evidence that the people that the Respondent alleges were supervised by the Petitioner met the requirements of subparagraphs (A) and (B) of the statute. On the contrary, with the reversal of Johnson's convictions the evidence is that there remains only four (4) persons of the required five (5) for a conviction under 21 U.S.C. Section 848 (c) (2) (A). (Reply Brief App. pp. 36a-40a) There being only four (4) people to supervise, Webster's conviction under 21 U.S.C. Section 848 (c) (2) (A) must be reversed. *United States v. Casamento*, 887 F.2d 1141 (2nd Cir. 1989).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

R. KENNETH MUNDY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the above Reply Brief to the Brief in Opposition to the Petition for Writ of Certiorari were mailed to Kenneth W. Starr, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 29th day of May 1990.

R. KENNETH MUNDY

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 90-6784

UNITED STATES OF AMERICA,
Appellee,

v.

WALTER R. WEBSTER,
Appellant.

Appeal from the United States Court for the
District of Maryland, at Baltimore
(Honorable Joseph H. Young)

BRIEF OF APPELLEE

BRECKINRIDGE L. WILLCOX
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Was the District Court's Finding, That the Condition That Would Have Triggered the Merging of Certain Sentences Did Not Obtain, Clearly Erroneous?

II. Did the District Court Commit Error By Concluding That Issues Waived on Direct Appeal Are Not Automatically Revived Through a Facile Allegation of Ineffective Assistance of Counsel?

III. Was the District Court's Finding That Counsel's Assistance Was Not Ineffective Clearly Erroneous When the Defendant Failed to Meet His Burden of Demonstrating Attorney Incompetence and a Resultant Prejudice?

STATEMENT OF THE APPLICABLE STANDARDS OF REVIEW

The first issue raised by the defendant is whether the district court should have merged several sentences following the direct appeal. The court declined the merger because it found that an operative condition for the merger had not been met. Because this is a finding of fact, it is subject to the clearly erroneous standard. *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

The district court disposed of the remaining issues raised by concluding that the issues had been waived on direct appeal and that the defendant could not construct a cognizable issue merely by asserting that failure to raise the issues on direct appeal constituted ineffective assistance of counsel. Because the conclusions regarding waiver and resuscitation are questions of law, they are subject to review for error.

The district court considered the ineffective assistance allegation as an independent claim for relief, and found that assistance was not ineffective. Because this is a finding of fact, it is subject to review for clear error.

STATEMENT OF THE CASE

On February 14, 1979, the Grand Jury for the District of Maryland returned a 35-count Indictment charging Walter Webster, Norma Thompson, Richard Adams, Norman Henson, Boysie Ash, Victoria Wills, Herbert Johnson, John Christian, Melvin Stanford, Julius Martin, and seven others with conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. § 846. Webster and Thompson were also charged with conducting a continuing criminal enterprise, in violation of 21 U.S.C. § 848, and with conducting the affairs of the "1508 Club," a bar they owned, through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c). Webster was charged, in addition, with 26 counts of using a telephone in furtherance of a narcotics enterprise, in violation of 21 U.S.C. § 843(b); with 4 counts of interstate travel in aid of a racketeering enterprise, in violation of 18 U.S.C. § 1952; and with possession of heroin with the intention of distributing it, in violation of 21 U.S.C. § 841.

Trial of the 17 named defendants commenced on April 27, 1979. The jury returned its verdict on May 18, 1979, convicting Webster of conducting a continuing criminal enterprise; conducting the affairs of an enterprise, the "1508 Club," through a pattern of racketeering; conspiring to distribute heroin and cocaine; 17 counts of illegal use of the telephone; and of 3 counts of interstate travel in aid of racketeering. On July 12, 1979, the court sentenced Webster to a 50-year term of imprisonment, followed by a special parole term of 15

years, as a result of his conviction under 21 U.S.C. § 848. Webster also received a concurrent 30-year term, as a second offender, for his conviction under 21 U.S.C. § 846; a concurrent 20-year term for violating 18 U.S.C. § 1962(c); concurrent eight-year terms as to each of 17 counts of unlawful telephone use; and concurrent five-year terms as to each of three interstate travel counts. All sentences were to run concurrent with the 50-year term. Finally, the sentencing order provided that if all counts were affirmed on appeal, then the court would set aside the sentences as to the unlawful telephone use counts.

On February 28, 1979, the Grand Jury returned a second indictment of Webster and Ash, charging them with possessing, at the time of their arrest on the first indictment, heroin with the intention of distributing it, in violation of 21 U.S.C. § 841, and cocaine, in violation of 21 U.S.C. § 844. The charges against Ash were dismissed by the government prior to trial. On July 18, 1979, Webster was tried on an agreed statement of facts before District Judge Frank Kaufman. Webster was found guilty, and on August 10, 1979, was sentenced to a term of 30 years imprisonment and a special parole term of 35 years, to run concurrent with the sentence imposed upon him as a result of his convictions on the first indictment.

Appeal was taken by Webster and several other defendants. Webster's conviction as to all but two counts was affirmed. The panel reversed the conviction of the RICO offense, finding that the government failed to prove that the specified enterprise had "had its affairs advanced or benefitted in some fashion, direct or indirect, by the pattern of racketeering activity." *United States v. Webster*, 639 F.2d 174, 185-86 (4th Cir.), *cert. denied sub nom Christian v. United States*, 454 U.S. 857 (1981). This

interpretation of 18 U.S.C. § 1962(c) was later corrected on rehearing by the same panel, and the RICO conviction was affirmed. *United States v. Webster,* 669 F.2d 185, 187 (4th Cir. 1982). The panel on rehearing left undisturbed its earlier opinion in all other aspects, including the vacation of Webster's conviction under 21 U.S.C. § 846.

On April 22, 1985, Webster filed a motion pursuant to 28 U.S.C. § 2255. On June 5, 1986, the motion was denied without an evidentiary hearing, and by marginal order dated July 18, 1986, the district court denied a letter request from Webster's counsel asking that the June 5 order be stricken. On August 14, 1986, Webster appealed the denial of his 2255 motion. On May 21, 1987, this Court dismissed the appeal for lack of jurisdiction due to the untimely notice of appeal.

On December 16, 1988, this second motion, pursuant to Section 2255 was filed. It was supplemented by the defendant on April 17, 1989, and was granted in part and denied in part on December 4, 1989.[1] A subsequent motion to reconsider was denied, and defendant filed a timely notice of appeal.

STATEMENT OF FACTS

As part of the defendant's sentence, the court ordered as follows:

> It is further provided that if there is an appeal and the convictions on all counts are affirmed on appeal, this Court will set aside the sentences imposed as to

---

[1] Defendant's first request below was that this Court's mandate on direct appeal, that the conviction under 21 U.S.C. § 846 be vacated, be given effect. Because such a result was appropriate, this part of the motion was granted.

each of Counts Nos. 4, 5, 6, . . . and 27 as merging into the greater sentence imposed under Count No. 2.

(A.1). The defendant appealed his conviction and raised many issues concerning various aspects of the investigation, indictment, and trial. *Webster*, 639 F.2d at 177. Convictions on all but one count were affirmed on appeal. *Webster*, 669 F.2d at 187.

ARGUMENT

The defendant has specified five issues in his brief, but several of these concern the merits of issues not decided below. The defendant's amended petition raised a total of seven issues; most of these concerned sufficiency of the evidence and instructions given at trial. The court did not reach the merits of the trial issues, concluding instead that the issues had been waived by a failure to raise them on direct appeal. The court grounded this conclusion on the defendant's correct concession that the issues were indeed waived. (A. 22).

Despite the concession, the defendant argued that he should be exempted because the waiver resulted from ineffective assistance of counsel. The court concluded that the waived issues could not be revived merely by asserting them as grounds in support of an allegation of ineffective assistance. Instead and correctly, the court considered the Sixth Amendment issue as an independent claim for relief, and found it lacking in merit.

The only issue raised below that was not available at the time of the direct appeal is whether the sentence provision for a contingent merging of the sentences imposed for the telephone use convictions should be given effect. The district court properly treated this as a factual in-

quiry into whether the triggering event had occurred, easily determined that the event had not occurred, and correctly denied relief.

On this appeal, the defendant seems to suggest that there is some legal basis requiring that the *convictions* on the telephone use counts merge as lesser included offenses into the vacated conspiracy count. Appellant's Brief at 6-7. This, however, is an issue that would operate independently, having nothing to do with the contingency created in the sentencing order. Consequently, like the other issues raised below, this issue was waived when it was not raised on direct appeal.

At bottom, there are only three issues cognizable on this appeal. First is whether the district court correctly found that the necessary event did not obtain that would have triggered the conditional merging of sentences. The second issue is whether waived issues can be revived simply by alleging that the waiver constitutes ineffective assistance of counsel. Finally, the district court's finding that ineffective assistance had not been demonstrated is reviewable for clear error.

Because the record supports the court's conclusion that the merger-triggering event did not obtain, the finding is not clearly erroneous. Because waived issues cannot be bootstrapped into an ineffective assistance of counsel claim, the district court's conclusion to this effect was not erroneous. Finally, because the defendant failed to meet his burden of demonstrating attorney incompetence and a resultant prejudice, it was not clear error for the court to find that counsel's assistance was not ineffective.

I. The District Court's Finding, That The Condition Did Not Obtain That Would Have Triggered A Merging Of Certain Sentences, Was Not Erroneous

The defendant contends that the district court committed error by refusing to set aside several eight-year sentences. The Judgment and Commitment Order, however, clearly provides that the relevant sentences were only to be set aside if "the convictions on all other counts are affirmed on appeal . . ." (A.1) The defendant acknowledges in his brief that "this Court set aside the conspiracy conviction under Count 2." Appellant's Brief at 6. Thus, the defendant, in effect, acknowledges that not all convictions were affirmed on direct appeal.

A finding of fact is not clearly erroneous if there is support for it in the record. *See Davis v. United States*, 328 U.S. 582, 593-94 (1946). This Court's mandate vacating the Count 2 conviction is part of the record and stands as obvious support for the district court's conclusion that this condition to the merging did not obtain. Consequently, the finding is not clearly erroneous.

The defendant argues that it is reasonable to merge the telephone use counts into the CCE count because the conspiracy count so merged. This argument, however, misses the point that he seeks merger through an application of the language of the Judgment and Commitment Order, not as a result of an independent legal theory. As is discussed above, an argument seeking merger as a matter of law has nothing to do with the sentencing order, and, moreover, was waived by a failure to raise it on direct appeal.

In sum, the record supports the district court's conclusion that not all convictions were affirmed on appeal;

therefore, the conclusion is not clearly erroneous. Because this condition did not obtain, the court correctly concluded that its sentencing order did not provide for a merging of the telephone use counts. Consequently, defendant's allegation of error lacks merit.

II. It Was Not Error For The District Court To Conclude That An Allegation Of Ineffective Assistance Of Counsel May Not Be Used to Establish Cause Under the "Frady" Standard

The defendant raised four challenges below to the sufficiency of the evidence and to the propriety of certain instructions to the jury.[2] He also conceded that "these four claims in question should have been raised on direct appeal . . ." (A.22). Defendant argued, however, as follows:

> It is precisely *that failure of counsel to raise the issues on direct* appeal, in addition to the plain error standard, that allows the defendant to raise these issues on collateral attack pursuant to 28 U.S.C. § 2255.

(A.22) (defendant's emphasis). Thus, the defendant asserted that an issue otherwise waived on direct appeal could somehow be revived merely by tacking on a claim of ineffective assistance of counsel. The district court rejected such a talismanic invocation of the Sixth Amendment and properly concluded that an allegation of ineffective assistance of counsel must be considered as a distinct

---

[2] The four allegations were: (1) whether the evidence was sufficient to sustain the CCE conviction; (2) whether an instruction identifying an accomplice as an accomplice was proper; (3) whether the defendant was entitled to a unanimity instruction regarding the identities of the persons organized, supervised, or managed by the defendant; and (4) whether defense counsel may stipulate to certain facts.

claim. Applying this approach, the court concluded at bottom that, based on the entire record, the defense counsel's performance "met the recognized standards of quality and effectiveness." (A.24)

The defendant now argues that the court erroneously separated the previously waived issues from his Sixth Amendment claim, and that an assertion of "ineffective assistance of counsel is sufficient here to allow review of the [waived issues] . . . ." Appellant's Brief at 15. The defendant, however, misapprehends the applicable law.

It is well settled that collateral attack will not be allowed "to do service for an appeal." *Sunal v. Large*, 332 U.S. 174, 178 (1947). *See United States v. Timmreck*, 441 U.S. 780, 784 (1979). This logic is carried forward in *United States v. Frady*, 456 U.S. 152 (1982), where the Supreme Court established the standard for relief on collateral review of alleged trial errors. Under this standard "the defendant must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." *Id.* at 168. Defendant Webster attempted below to establish cause under this standard by alleging that his counsel was ineffective, but this is not the nature of 'cause' to which the Court was referring.

In *Frady*, the defendant claimed that he had failed to challenge an improper jury instruction on direct appeal because the court of appeals first rejected a similar instruction two years *after* his appeal was decided. *Id.* at 168 n.16. Along these lines, in *Sunal* the Supreme Court elaborated on the "exceptional circumstances" which would qualify as cause for defaulting an issue on direct appeal:

> It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in

> the law or the impact of a new decision has given increased relevance to a point made at the trial but not pursued on appeal . . . . Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications.

332 U.S. at 182. The defendant did not point to such a statutory or interpretative shift to justify the failure to seek a direct appeal as to the alleged trial errors. Instead, he simply alleged that the "cause" for the default was ineffective counsel, and that ineffectiveness is demonstrated by the default.

A similar argument was addressed by the Supreme Court in *Murray v. Carrier*, 477 U.S. 428 (1986). There, the defense counsel failed to conduct obvious discovery and as a result failed to file a timely motion to suppress certain evidence. *Id.* at 482. The evidence was admitted; the defendant was convicted; and on appeal, counsel failed to raise the issue. *Id.* A federal district court denied the subsequent habeas petition, finding that the suppression issues had been effectively waived by default. *Id.* at 483.

Like Webster, the defendant argued that the issues had been waived as a result of attorney error and that such an error was proper "cause" for habeas review under *Frady*. *Id.* The Supreme Court clearly rejected this proposition:

> the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default.

Id. at 486-87. Thus, the simple allegation that an issue was not raised by defense counsel does not meet the first prong of the *Frady* "cause and prejudice" test.

The Court went on to establish that a showing of something more could meet the level of cause required:

> So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, [466 U.S. 668 (1984),] we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.

Id. at 488. Thus, the allegation of attorney error must either implicate the Sixth Amendment or be enhanced by a showing of some external force that led to the default. Webster has not even alleged an external factor, let alone met the burden of demonstrating the existence of one. Therefore, under *Murray v. Carrier*, the defendant has failed to demonstrate " 'cause' excusing his double procedural default," as is required under *Frady*, 456 U.S. at 168.

The defendant attempts to enhance the alleged attorney error by labeling it "ineffective assistance of counsel." Indeed, in *Murray v. Carrier*, the Supreme Court did recognize that "[i]neffective assistance of counsel, then, is cause for a procedural default." 477 U.S. at 488. The Court went on to state, however, that ineffective assistance must be considered "as an independent claim *before* it may be used to establish cause for a procedural default." *Id.* at 489. The record clearly shows that the district court did exactly that. The court considered the allegation of ineffective assistance as a separate issue and stated as follows:

> A review of the entire record in this case reaffirms this Court's impression that defendant Webster received the assistance of a highly experienced criminal defense attorney whose representation in the instant case has met the recognized standards of quality and effectiveness. Webster's motion to vacate based on ineffective assistance of counsel will, accordingly, be denied.

(A. 24). Thus, because counsel's assistance was not ineffective, Webster failed to establish "cause" under *Frady* and *Carrier.*

Webster relies heavily on *Kimmelman v. Morrison*, 477 U.S. 365 (1986), where the Supreme Court held that claims of ineffective assistance of counsel are cognizable on collateral attack. *Kimmelman,* however, does not require that the habeas court consider the merits of defaulted issues. To the contrary, and entirely consistent with its opinion in *Carrier,* the Supreme Court requires that the assistance of counsel be considered as an independent issue.

> We do not share petitioner's perception of the identity between respondent's Fourth and Sixth Amendment claims. While defense counsel's failure to make a timely suppression motion is the primary manifestation of incompetence and source of prejudice advanced by respondent, *the two claims are nonetheless distinct, both in nature and in the requisite elements of proof.*

477 U.S. at 374 (emphasis supplied). Thus, the district court was not in error when it considered the allegation of ineffective assistance as a distinct claim.

Because the elements of proof necessary to a demonstration of ineffective assistance are distinct from those necessary to a demonstration of the alleged trial errors,

the defendant's argument that a decision on the merits is required in any case is incorrect. The Sixth Amendment claim must be evaluated under the rigorous standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Carrier*, 477 U.S. at 488; *Kimmelman*, 477 U.S. at 381-82. Only after ineffective assistance is found by the district court, has the cause for the waiver of the trial issues been demonstrated. And only then should the court consider the merits of waived issues.

Because the district court did not find that counsel's assistance was ineffective, cause under *Frady* was not established. Consequently, it was not error to refuse to consider the merits of the alleged trial errors.

III. The District Court's Finding That Counsel's Assistance Was Not Ineffective Was Not Clearly Erroneous When The Defendant Failed To Meet His Burden Of Demonstrating Attorney Incompetence And A Resultant Prejudice

Once the Sixth Amendment claim was severed from the other issues, the court found that counsel's assistance was not ineffective, and the court properly employed the *Strickland* standard in reaching this conclusion. *Strickland* places the burden on the defendant to prove both incompetence and prejudice as a result. 466 U.S. at 687. Webster failed as to both elements below.

"Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700. Because the defendant did not even attempt to meet either burden below, the Sixth Amendment claim was properly rejected.

As to the first element, the defendant asserts that his allegations of trial error demonstrate deficient perform-

ance. As the government demonstrated at length in its Answer below, the allegations of error are without merit. At the very best, the defendant has established that his fine-toothed rake has unearthed arguable propositions, but this is nowhere near a sufficient showing. He did not demonstrate that it would have been incompetent for trial counsel to have decided not to raise the issues. He merely assumes that it would be incompetence to fail to raise the issues that he has specified.

Even assuming *arguendo*, that defendant's tissue issues have merit, the trial counsel's choice not to raise them is due a high degree of deference. *Strickland*, 466 U.S. at 689. The decision not to object at trial is accorded a heavy presumption that it was within "the wide latitude counsel must have in making tactical decisions." *Id.* Consequently, the defendant has a heavy burden in order to overcome this presumption. A review of defendant's motion reveals that he made no attempt to even address this presumption or to show how the alleged errors could not have been tactical decisions.[3] Therefore, the presumption prevails even if the allegations had merit, and the challenge to counsel's effectiveness was properly rejected.

On appeal, defendant's argument is even weaker. He argues simply that "Appellant *had a right* to have his trial counsel object to the use of the court's erroneous instruction . . ." and that "Appellant *was entitled, as a matter of law,* to have the judge at trial to charge the jury with a specific unanimity instruction. . . ." Appellant's Brief

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[3] Along these lines, it should not escape notice that at least seventeen issues pertaining to Webster were argued on direct appeal. Webster, 639 F.2d 174. It would not be unusual in such circumstances to decline to raise less meritorious issues in order to focus the appeal.

at 24 (emphasis supplied). Once again the government submits that both propositions are wrong as a matter of law; but assuming, *arguendo*, that the propositions are correct, the demonstration of error is insufficient under *Strickland*. The defendant must, as his burden, show that the errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Vague references to due process and fairness are nothing but half-hearted attempts at sensationalizing the allegations.

There is absolutely no point in considering the merits of the allegations of error if the defendant fails to describe a *specific theory* whereby the error can be seen as a factor yielding a total miscarriage of justice. A defendant is entitled to a fair trial, not an error-free one. Under *Strickland*, Webster is not permitted to simply allege error and then wait for the government to show that, in context, the defense was competent notwithstanding the error. It is expressly the defendant's burden to place the error in context and then show that the context depicts a lack of counsel. 466 U.S. at 688 ("the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances"). In short, the defendant did not fill in the entire picture; instead, he hangs his weak allegations of error in mid-air like the grin of the Cheshire Cat.

As to the second element of the *Strickland* test, the defendant makes only conclusory allegations of prejudice. For example, he stated below that, had his counsel not stipulated that the 1508 Club was an enterprise engaged in or affecting interstate commerce, the jury would have acquitted on the RICO count. He ignores the certainty that without the stipulation the government would have supplied proof of this fact. Similarly, on appeal he posits that, had the trial court given a unanimity instruction concerning the identities of the persons organized

for CCE purposes, he would have been acquitted. Appellant's Brief at 24. He ignores the possibility that the jury could have easily agreed on more than five specific persons. *Strickland* requires a great deal more.

As above, the government maintains that defendant's allegations of error are totally lacking in merit. Notwithstanding this crucial deficit in defendant's argument, and assuming, *arguendo*, that error could be shown, and assuming, *arguendo*, that the errors in context demonstrated attorney incompetence, the defendant would still have to demonstrate actual prejudice. In order to demonstrate actual prejudice,

> [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. The defendant totally fails in this regard.

Webster claimed below that counsel failed to object to insufficient evidence that he organized five or more persons. Because the record reflects that he organized dozens, such an objection would have been rejected as frivolous. He claimed below that counsel failed to object to an instruction identifying an accomplice as such. Because the record reflects that the accomplice admitted participating as an accomplice, an objection would have been rejected as frivolous. He claimed below that counsel failed to request a unanimity instruction concerning the identities of the persons organized for CCE purposes. Because courts have consistently rejected such an instruction, both before Webster's trial and since, the request most certainly would have been denied. He claimed below that counsel improperly stipulated that interstate commerce was implicated. Because the government would have

offered proof of this fact, an absence of a stipulation does not necessarily imply an absence of proof. In short, if defense counsel had made the additional objections, requested the instruction, and declined the stipulation, the trial result would have been identical.

More to the point, however, is the fact that even at this stage of the inquiry the merits of these issues need not be examined. Before the merits become material, the defendant must demonstrate that there is a "reasonable probability" that he would have been acquitted. In this regard, he has made no attempt to explain away the overwhelming trial evidence of his guilt.

The defendant has not shown that his allegations of error had any conceivable effect on the outcome of the proceeding, much less has he shown a reasonable probability that he would have been acquitted. Consequently, he has failed to demonstrate even a shadow of prejudice, under *Strickland*, he has demonstrated exactly nothing.

CONCLUSION

For the foregoing reasons, the district court's denial of the Motion Pursuant to Section 2255 should be affirmed.

Respectfully submitted,

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APPENDIX B

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

Appeal No. 90-6784

WALTER R. WEBSTER,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal From The United States District Court
For The District of Maryland
The Honorable Joseph H. Young

APPELLANT'S BRIEF

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ISSUES PRESENTED

A. Whether the District Court should comply with its initial ruling and set aside seventeen counts of illegal use of the telephone if all other counts were affirmed on direct appeal.

B. Whether the District Court erred in holding that ineffective assistance of counsel may not properly be used for of collateral review under 28 U.S.C. Section 2255 issues that could have been raised on direct appeal.

C. Whether this Court should review Appellant's claim that the evidence is legally insufficient to sustain the conviction of a continuing criminal enterprise.

D. Whether Appellant's challenge to the RICO Conviction (18 U.S.C. Section 1962(c)) constitutes a question of jurisdiction raisable at any time to permit review under 28 U.S.C. Section 2255.

E. Whether the District Court erred in holding that appellant was not denied the effective assistance of counsel at trial and on direct appeal.

STATEMENT OF THE CASE

In 1979 a 34 Count criminal indictment in the United States District Court for the District of Maryland charged Appellant and others, with violation (narcotics) of 21 U.S.C. Section 846, 841, and 843. Appellant, alone, with a continuing criminal enterprise (CCE) in violation of 21 U.S.C. Section 848. See *United States v. Walter R. Webster, et al.*, Criminal No. Y-79-060.

After disposition of pre-trial motions and disposition certain indicted co-defendants, Appellant and remaining co-defendants (Richard Adams, Norma Thompson, Boy-

sie Ash, Victoria Wills, John V. Christian, Herbert Leon Johnson, and Julius Odell Martin) proceeded to trial. The jury convicted Appellant on all counts (including CCE; conducting the affairs of the enterprise through a pattern of racketeering, 18 U.S.C. Section 1961, 1962(a) and 1963; conspiracy to distribute cocaine and heroin in violation of 21 U.S.C. Section 846; 17 counts of illegal use of the telephone, in violation of 21 U.S.C. Section 843; and 3 counts of interstate travel in aid of racketeering in violation of 18 U.S.C. Section 1952). The jury returned verdicts of not guilty as charged on all counts of the indictment as to co-defendants Standford and Martin. Co-defendants Thompson, Ash, Wills, Christian, and Herbert Leon Johnson were found guilty of a conspiracy (21 U.S.C. Section 846) to violate the federal narcotics laws.

On July 9, 1979, the Court sentenced Appellant to fifty (50) years imprisonment on the CCE, (Count 34); twenty (20) years on RICO (Count 1); thirty (30) years on the 21 U.S.C. 846 conspiracy conviction; eight (8) years each on 17 counts of unlawful use of the telephone (Counts 4, 5, 6, 8, 22, 13, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, and 27); and five (5) years on each of the three counts of interstate travel in aid of racketeering (Counts 30, 31, and 32). The sentence were fashioned to run concurrently (total term of imprisonment fifty (50) years).

The sentencing order further provided that if there is an appeal and if convictions on all counts are affirmed on appeal, the sentencing court would set aside the sentences imposed as to Counts 4, 5, 6, 8, 11, 13, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25 and 27; they would merge into the greater sentence imposed on Count 2.

On direct appeal from the convictions and sentences by Appellant and his convicted co-defendants, the Appeals Court for the Fourth Circuit 1) ordered Appellant's conviction stricken as to Count 2 of the Indictment; 2) affirmed Appellant's convictions and sentences on all other counts. The Court reversed the 21 U.S.C. 846 conspiracy convictions against Appellant's co-defendant, Herbert Leon Johnson, on insufficiency of evidence. The Court affirmed the convictions and sentences as to all other co-defendants. (*United States v. Webster*, 639 F.2d 174 (4th Cir. 1981)).

After consideration of a petition for rehearing, the Court of Appeals, *en banc*, reversed the original the panel and reinstated the RICO conviction and sentence on Appellant. The original panel decision was undisturbed in all other respects. A petition for a writ of certiorari was denied by the Supreme Court. During the latter part of 1988, Appellant filed with the Court below a Motion to Set Aside Sentence pursuant to 28 U.S.C. Section 1651(a) and 2202. In April 1989, Appellant submitted a motion to vacate and set aside sentence and accompanying supplement thereto pursuant to 28 U.S.C. Section 2255.

At sentencing in July 1979, the court had specified that if all counts were affirmed on direct appeal, the sentencing court would set aside the sentences as to the 17 counts of illegal use of the telephone against Appellant. The convictions on all counts were affirmed with the exception of the conviction as to Count 2 (conspiracy in violation of 21 U.S.C. Section 846) which was ordered stricken as merging into the greater offense at Count 34 (CCE 21 U.S.C. Section 848). Appellant moved the sentencing court to comply with the mandate of the Court of Appeals, by striking the conspiracy conviction and asked the sentencing court to comply with its initial proviso by vacating and setting aside the sentences on the 17 Counts of illegal use of the telephone.

After the government's response to said motions and without hearing, the District Court entered a Memorandum and Order December 4, 1989 granting in part and denying in part the motion to set aside sentence pursuant to 28 U.S.C. Section 1651(a) and 2202[1] and further denying Appellant's motion to vacate and set aside sentence under 28 U.S.C. Section 2255. A subsequent motion to reconsider the Memorandum and Order pursuant to Rule 59, Federal Rules of Civil Procedure was denied without opinion. Appellant then filed a timely notice of Appeal from the December 4, 1989 Memorandum and Order.

Appellant's Motion to Vacate and Set Aside Sentence pursuant to 28 U.S.C. Section 2255 presented several distinct constitutional claims challenging the validity of the convictions against him on grounds that (a) the evidence was insufficient to sustain a conviction under 21 U.S.C. section 848 (CCE); (b) the trial Court's instructions were insufficient to sustain a conviction under 21 U.S.C. Section 848 (CCE) and were erroneous and caused Appellant to be denied a fair trial; (c) the jury was denied the opportunity to consider a factual element of the RICO offense due to an unauthorized stipulation by defense counsel, and (d) ineffective assistance of counsel at trial and on direct appeal. Finding that there was an absence of good cause supporting a collateral attack of the CCE and RICO convictions and sentences under 28 U.S.C. Section 2255, the District Court denied relief without reaching the merits of the claims. The District Court ruled that these should have been raised in the direct appeal.

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[1] The Court granted the motion in part by striking the conviction and sentence under Count 2 of the Indictment and denied the motion in part by refusing to vacate and set aside the sentences as to the 17 Counts of illegal use of the telephone.

The memorandum and order of the District Court below is erroneous as a matter of law.

ARGUMENT

I. THE APPELLANT IS ENTITLED TO HAVE THE DISTRICT COURT COMPLY WITH ITS INITIAL SENTENCING COMMITMENT AND SET ASIDE SEVENTEEN COUNTS OF ILLEGAL USE OF THE TELEPHONE SINCE ALL OTHER CONVICTIONS WERE AFFIRMED ON DIRECT APPEAL.

The Court's precise language was:

> "It is further provided that if there is an appeal and the convictions on all counts are affirmed on appeal, this court will set aside the sentencing imposed as to each of Counts Nos. 4, 5, 6, 8, 11, 13, 15, 16, 17, 18, 20, 21, 23, 24, 25, and 27 as merging into the greater sentence imposed under count No. 2" *Judgment and Commitment Order dated July 9, 1979.*

The Court below, on Motion to Vacate and set aside the 17 convictions of illegal use of the telephone, took the position that since the Court of Appeals appeal had struck Appellant's conviction under 21 U.S.C. Section 848 (CCE). All convictions of appellant were not affirmed on appeal. This rationale of the Court is contrary precedents defining the relationship between conspiracy in violation of the 21 U.S.C. Section 846 and conducting a continuing criminal enterprise (CCE) in violation of the 21 U.S.C. Section 848. As this Court noted in deciding Appellant's direct appeal:

> "Although at least two Circuit Court of Appeals have stated Section 846 is a lesser included offense of Section 848, see *United States v. Strickland*, 591

F.2d 1112, 1123 (5th Cir. 1979), cert. denied, 449 U.S. 963, 100 S.Ct. 449, 62 L.Ed.2d 375 (1979); *United States v. Sperling*, 560 F.2d 1050, 1055 (2d Cir 1977), it is unnecessary that we decide the issue. At oral argument, counsel for the United States admitted that Section 846 is a lesser included offense of Section 848 and thus that the offenses merged. Accordingly, we hold that Appellant's sentence under Section 846 must be stricken." *United States v. Webster*, 639 F.2d 174, 182 (4th Cir. 1981)

For obvious reasons sounding in the Fifth Amendment's prohibition against double jeopardy, this Court set aside the conspiracy conviction under Count 2, as duplicative of the conviction on the greater offense. It would otherwise be constitutionally impermissible. See *United States v. Butler*, 885 F.2d 195, 202 (4th Cir. 1989). See also, *United States v. Ragins*, 840 F.2d 1184 (4th Cir. 1988); *United States v. Aguilar*, 849 F.92, 97-99 (3rd Cir. 1988) (holding conspiracy to be a lesser included offense of CCE). Thus the Count 2 conspiracy conviction "merged" into the Count 34 CCE conviction for constitutional reasons. The plain language of the judgment and commitment Order contemplated that the sentences on the telephone counts would merge into the sentence imposed for the conspiracy. We submit it would be irrational to hold that the initial intent of the sentencing court is now defeated because the Fifth Amendment of the Constitution of the United States caused the lesser Count 2 offense to merge into the greater CCE offense. Reason and due process dictates that the justification for "merging" sentences for the telephone counts is still applicable.

Accordingly, the court below should be reversed and this matter remanded with instructions to vacate and set aside the sentences imposed as to each of the Counts Nos. 4, 5, 6, 8, 11, 13, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, and 27 and for compliance with original judgment and commitment order of the sentencing court.

II. THE DISTRICT COURT ERRED IN HOLDING THAT INEFFECTIVE ASSISTANCE OF COUNSEL MAY NOT PROPERLY BE THE BASIS FOR COLLATERAL REVIEW UNDER 28 U.S.C. SECTION 2255 OF ISSUES THAT COULD HAVE BEEN RAISED ON DIRECT APPEAL.

Appellant presented to the trial court claims that (a) the evidence was insufficient to sustain a conviction under 21 U.S.C. Section 848 (CCE), (b) the trial judge's instructions to the jury were erroneous and caused Appellant to be denied a fair trial, (c) the jury was denied opportunity to consider a factual element of the RICO offense due to an unauthorized stipulation by defense counsel, and (d) ineffective assistance of counsel at trial and on direct appeal. The Court parried the claims and applied the "cause and actual prejudice standard enunciated in *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed 2d 816 (1982), holding finally that:

> ". . . allegations of ineffective assistance of counsel may not properly be used for the secondary purpose of establishing "cause" so as to afford defendant a second chance at appellate review of any and all issues that could have been raised during the direct appeal . . . [it] would clearly violate society's legitimate interest n the finality of the judgment of conviction".

The District Court's application of *Frady* is misplaced under the circumstances of the instant case, as the Supreme Court of the United States, recognizing the constitutional right of defendants to the effective assistance of counsel, unequivocally established "ineffective assistance of counsel" as sufficient "cause" under the "cause and actual prejudice" standard to permit review of procedurally defaulted claims on collateral attack. *See Kimmelman v. Morrison*, 447 U.S. 365, 91 L.ed.2d 305, 106 S.Ct. 2574 (1986). The Supreme Court in *Kimmelman* reasoned that:

> "Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the lititgation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance, cf. *Powell v. Alabama, Supra*, at 69, 77 L.Ed. 158, 53 S.Ct. 84 ALR 527; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal. Were we to extend *Stone* and hold that criminal defendants may not raise ineffective assistance claims that are based primarily on incompetent handling of Fourth Amendment issues on federal habeas, we would deny most defendants whose trial attorneys performed incompetently in this regard the opportunity to vindicate their right to effective trial coun-

> sel. We would deny all defendants whose appellate counsel performed inadequately with respect to Fourth Amendment issues the opportunity to protect their right to effective appellate counsel. See *Evitts, Supra.* Thus, we cannot say as the Court was able to say in *Stone,* that restriction of federal habeas review would not severely interfere with the . . . constitutional right asserted by the habeas petitioner. *Kimmelman,* 91 L.Ed 2d at 321.

In a compelling footnote, Kimmelman further states:

> Moreover, the restriction of federal habeas relief established by *Stone v Powell* was predicated on the existence at trial and on direct review of "an opportunity for full and fair litigation" of the constitutional claim advanced by the habeas petitioner. 428 U.S. 465, 49 L.Ed .2d 1067, 96 S.Ct. 3037 (1976). In general, comparable, meaningful opportunity exists for the full an fair litigation of habeas petitioner's ineffective assistance claim at trial and on direct review." *Kimmelman* 91 L.Ed.2d at 321 n.3

Not only is the District Court's reasoning in the instant case founded on rationale which precedes *Kimmelman v. Morrison, supra, Strickland v. Washington,* 466 U.S. 668 (1984), and *Evitts v. Lucey,* 469 U.S. 387 (1985), the District Court's reasoning lends no support to the public's interest in ensuring that every defendant charged with a criminal offense receives fair proceedings, trial and appellate, under the fundamental protection of the Constitution of the United States. The Sixth Amendment right to effective assistance of counsel, as the Supreme Court pointed out, is "beyond question a fundamental right".

As to the District Court,s conclusion that the claims raised by Appellant on collateral attack pursuant to 28 U.S.C. Section 2255 should have been raised on direct

appeal, surely judicial fairness would not excuse the failures of counsel to timely and appropriately present these claims nor should counsel be placed upon Appellant's shoulders. Such penalization of a defendant who brings a collateral attack against conviction, would flutter in the face of a constitutional right to a fair trial under Sixth Amendment Standards. It is through counsel that an accused's rights are indicated. (*Kimmelman*, 91 L.Ed.2d at 320). Thus, the facts of the instant case require judicial evaluation of the legal representation in Appellant's case both at trial and on direct appeal.

The District Court below have not considered Appellant's "right" to have trial counsel make necessary objections and have appellate counsel raise necessary issues on direct appeal.

The Fifth Amendment guarantees that no person shall be deprived of liberty without due process of law. In *Strickland v Washington, supra*, the Supreme Court counsel's tactical strategies, reviewed "from counsel's perspective at the time," *Id at 466 United States at 690.* Therefore, collateral attack to address issues which should have initially been raised at trial and on direct appeal must be an avenue open to a defendant in a criminal case who has been, *per se*, deprived of his right to fully litigate constitutional claims and challenges or convictions unfairly procured. The Supreme Court has recognized that "the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Kimmelman v. Morrison, supra*, citing *Murray v. Carrier*, 106 S,Ct, 2639 (1986). Concerning counsel's failure to object to or request a limiting instruction on the prosecution's use of details of a defendant's robbery conviction, the United States Court of Appeals for the Fifth Circuit reasoned that "[t]o pass over the admission of prejudicial

and arguably inadmissable evidence may be strategic; to pass over the admission of prejudicial and clearly inadmissable evidence, as here, has no strategic value." *Lyons v. McCotter,* 770 F.2d 529, 534 (5th Cir. 1985), *cert. denied,* 106 S.Ct. 833 (1986). In another case, the Fifth Circuit found failure to raise two non-frivolous issues on appeal unreasonable. *Lockhart v. McCotter,* 782 F.2d 1275, 1283 (5th Cir. 1986).

In the instant case, the Court below stated that the issues raised by Appellant's 2255 motion should have been raised on direct appeal. The court did not find the issues frivolous nor meritless. It simply diverted and deflected them for tardiness. This we respectfully submit was error because due process guarantees the right to effective assistance of counsel on first appeal as a matter of right. See, *Evitts v. Lucey,* 469 U.S. at 390.

Appellant's effort to establish requisite with a 2255 Motion by averring ineffective assistance of counsel is not without merit. The trial court's contrary finding is erroneous as a matter of law, should be reversed, and the matter remanded to meet *Kimmelman v. Morrison, supra.*

The District Court's finding that "allegations of ineffective assistance of counsel may not properly be used for the secondary purpose of establishing "cause" so as to afford [Appellant] a second chance at appellate review of any and all issues that could have been raised during the direct appeal," (*Memorandum and Order, pp. 5-6.*) must also be reversed to satisfy *Evitts v. Lucey, supra.*

In declining to entertain Appellant's claim challenging the constitutionality of the RICO conviction where said RICO conviction is obtained by the use of an unauthorized stipulation which relieved the jury of making a finding on an essential element (that the 1508 Club's business operated in a manner effecting interstate commerce), the

Court stated that "the issue of whether or not Appellant's counsel was ineffective at trial is one which was available to the defendant at the time of the direct appeal and may not properly be raised on collateral attack." *Memorandum and Order, p. 7.* As a matter of law, this ruling too is erroneous and must be reversed under *Kimmelman v Morrison, supra.* Moreover, the lower court's findings on this issue are, unsupportable. The record establishes that trial counsel was the *same* counsel who handled the direct appeal. Under such circumstances, it would be unexpected that appellate counsel would mark his own failure to make objections at trial. He would be in the awkward position of alleging his own incompetency; or a more charitable reason may be that the omission would not appear to him as incompetence since the eyes and ideas of the appellate advocate are the same as those of the trial advocate.

In determining that attorney oversight appear to be only plausible explanation for [the attorney's] failure to timely file an asylum application on behalf of a detained immigrant, this Court decided that:

> "In view of these facts, we must vacate the FBI's findings that Figeroa did not suffer ineffective assistance of counsel. The evidence is clear that Tellez's conduct failed to meet even the minimum level of competence expected of an attorney under these circumstances. At the very least, an attorney is ethically bound to act in the best of his client's interests. See e.g. ABA Code of Professional responsibility, Canons 6, 7 and EC7-1. There seems little doubt that Tellez's conduct failed to meet this standard." See *Figeroa v. United States I.N.S.*, 886 F.2d 76, 79 (4th Cir. 1989).

This Court should therefore find that for the purpose of establishing "Cause", under *Frady*, ineffective assis-

tance of counsel is sufficient here to allow review of the claims presented by Appellant's 2255 motion, in light of *Kimmelman v. Morrison, supra,* and *Figeroa v. United States I.N.S., supra.*

Accordingly this Court should find that the District Court below has ruled in error and remand this case to the for an evidentiary hearing on the merits of Appellant's claims to determine whether the racketeering conviction and the CCE conviction should be vacated and set aside under 28 U.S.C. Section 2255.

In the alternative, the Court of Appeals could afford Appellant's Motion to Vacate and Set Aside Sentence under 28 U.S.C. Section 2255 *de novo* review because of the District Court's refusal and failure to consider Appellant's 2255 claims on the merits.

III. THE COURT SHOULD REVIEW APPELLANT'S CLAIM THAT THE EVIDENCE IS NOT SUFFICIENT TO SUSTAIN THE CONVICTION FOR A CONTINUING CRIMINAL ENTERPRISE.

At the beginning of trial on the court instructed the Jury that it was not to be concerned with any of the other persons listed on the initial page of the indictment as defendants in Appellant's trial. The court further instructed the jury that the others had already been dealt with. The remaining defendants were Adams, Thompson, Ash, Wills, Christian, Herbert Leon Johnson, Stanford, and Martin.

Stanford and Martin were acquitted on all counts. Thompson, Ash, Wills, Christian and Johnson were convicted of the 846 Count, Thompson, Ash, Wills, Christian, and Johnson were convicted as co-conspirators in the entity orchestrated by Appellant. Adams was found guilty of Count 2 of the indictment (846), unlawful use

of the telephone, and aiding and abetting. It was proven at trial as alleged in the indictment that Adams was merely the supplier of narcotics was not under Appellant's management or supervision.

On appeal this court found the evidence was insufficient to support a conviction for conspiracy to distribute narcotics against co-defendant Herbert Leon Johnson as follows:

> "The question demanding our resolution is whether the evidence summarized above, viewed in light most favorable to the government, is sufficient to convict Johnson of conspiracy to distribute, or possession with intent to distribute narcotics. We conclude the evidence is not sufficient and therefore reverse Johnson's conviction under the conspiracy count. . . while the government may have proved that Johnson used drugs, it did not prove he was a "heroin distributor" as the indictment charged. . again, there is no proof Johnson telephoned for any other purpose than to at most supply his own habit. We decline to find guilt of distribution simply on the basis of association. *United Sates v. Webster*, 639 F.2d 174, 188 (4th Cir. 1981).

Since Johnson was not a part of the narcotics conspiracy it can only be assumed that the jury improperly inferred that Johnson was *one* of the "five or more persons" for whom Appellant was charged with a supervisory and managerial role. The jury's erroneous reliance on Johnson's new presence in the indictment makes the conviction of appellant reversible. Where the evidence was insufficient to establish Johnson as a distributor for Appellant, the evidence is equally insufficient to establish that Appellant occupied a position as manager or supervisor over Johnson and thus there are not the five required underlings. As a corollary we note that the

Supreme Court has held that: Where two are charged with criminal conspiracy and the conviction of one is reversed because of insufficiency of evidence, the conviction of the other must likewise be reversed. *Ferbardi v. United States*, 287 U.S. 112, 53 S.Ct. 35, 77 L.Ed. 206.

The Supreme Court also held that:

> "A federal appellate court, under the harmless error statute, should permit a judgment to stand not withstanding error, where the court is sure that the error did not influence the jury or had but very slight effect on it, except perhaps where the departure is from a constitutional norm of a specific command of congress; but if the court, after pondering all that happened without stripping the erroneous action from the whole, cannot say with fair assurance that the judgment was not substantially swayed by the error, the judgment must be reversed, even though there may have been enough to support the result apart from the phase affected by the error. *Kotteakos v. United States*, 328 U.S. 7550, 66 S.Ct. 1239, 90 L.Ed. 1557.

In order to establish violation of 21 U.S.C. 848, it is incumbent upon the government to prove that defendant occupied a position as organizer or supervisory position with respect to continuing narcotics trafficking operation in concert with five or more persons. See *United States v. Sperling*, 507 F.2d 1323 (2d Cir.), *cert. denied*, 420 U.S. 949, on remand 413 F.Supp 845 (1974). Such proof of acting in concert with five or more persons was part of the government's burden of proof in establishing the elements of CCE offense in violation of 21 U.S.C. 848 in Appellant's case. Because it has been found that Johnson was not a member of the conspiracy ad was not

a distributor for Appellant, the evidence is insufficient, as a matter of law, to find that Appellant managed or supervised the requisite five or more persons necessary to convict under 21 U.S.C. 848.

The evidence did not permit a rational jury to find that Appellant occupied a position of manager or supervisor with respect to five or more persons. The trial court informed the jury that:

> "This case has been disposed of as to certain defendants, and when you receive a copy of the indictment, you will note that certain defendants are listed on the initial page of the indictment, but those counts have been withdrawn from those available to you, but you will notice that certain are missing from the trial at this time. They are specifically Richard Wilkes, Jane Doe, Duran Montgomery, Mark Edmead, Dennis E. Smith, Norman L. Johnson, Jr., and Sharon Taylor. *They are no longer of any concern to you,* and you should not speculate as to the reason for the disposition of their case. *This disposition should not control influence tour verdict with reference to the remaining defendants, and you must base your verdict as to each of the defendants solely on the evidence against each of them. Trial Court Judge's instruction to the jury at Tr pp 2022-2023)* (Emphasis Added)

The Court thus told the jury it could not consider any of the others not present at trial. In effect it told the jury that it could not decide whether those other would make up the five needed under 848. The jury was thus left only with Norma Thompson, Boysie Ash, Victoria Wills, John V. Christian, and Herbert Leon Johnson as the requisite five needed to convict Appellant of CCE in violation of 21 U.S.C. 848. But this Court reversed Johnson's conspiracy conviction thus decisicely removing Johnson from

the tabulation. Absent Johnson, the jury could not have reached a sustainable verdict of guilty on 848 against Appellant. Where there is *probability* that the error contributed to the verdict, reversal is required. See, *Wilson v Mintzes*, 761 F.2d 275, 288 (6th Cir. 1985). No harmless error rule when error contributes to verdict obtained. See *Miller v. Norvell* 775 F.2d 1572, 1576 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 19915 (1986). Some errors necessarily render trial fundamentally unfair. See *Rose v. Clark*, 478 U.S. 570 (1986).

Accordingly, this court should reverse the CCE conviction against Appellant on insufficiency grounds and direct that the sentence of fifty (50) years imprisonment be vacated.

IV. APPELLANT'S CHALLENGE TO THE RICO CONVICTION (18 U.S.C. SECTION 1962 c)) CONSTITUTES A QUESTION OF JURISDICTION WHICH MAY BE RAISED AT ANY TIME TO PERMIT REVIEW UNDER 28 U.S.C. SECTION 2255

The District Court declined to review Appellant's RICO conviction on the premise that the issue challenging the validity of the RICO conviction under ineffective assistance of counsel was available to the [appellant] at the time of the direct apeal and may not be raised collaterally ("U.S. District court Memorandum and Order, p.7). The claim challenging the RICO conviction raises an important question because the claim effects the subject matter jurisdiction of the Court to try Appellant on the RICO count. In the instant case, the Government and Appellant's attorney entered into a pre-trial stipulation that the 1508 Club was a business engaged in interstate commerce. Appellant now argues (and the Government

does did not deny) that the law of the State of Maryland prohibited any Maryland business licensed for the retail sale of alcoholic beverages to sell outside of the State. The government offered no evidence beyond the stipulation to meet its burden of proof on this element of the RICO count. If the evidence as represented by the government did not establish that the 1508 Club was engaged in such a manner as to effect interstate commerce, the government did not prove that the matters charged in the RICO count constituted an offense under the federal jurisdiction of the United States District Court. Questions of jurisdiction can be raised at any time. (*United States v. Fallop,* 838 F.2d 105, 11 N.2 (4th Cir. 1988) (citing *McGrath v. Kristensen,* 340 U.S. 162, 167, 71 S.Ct. 224, 228, 95 L.Ed. 173 (1950)). The rule is inflexible and without exception.

On every writ of error or appeal, the first fundamental question concerns jurisdiction, appellate jurisdiction and trial jurisdiction of the courts involved. This is a question a court is bound to ask and answer for itself, even when not otherwise raised. See *Delaware v. Van Arsdall,* 475 U.S. 673, 89 L.Ed.2d 674, 692 N.4, 106 S.Ct. 1431 (1986) (citing *Mansfield C. & L.M.R. Co. v. Swan,* 11 U.S. 379, 382, 28 L.Ed. 462, 4 S.Ct. 510 (1884).

The very nature of the challenge to the RICO conviction here requires reversal. The unauthorized stipulation of the interstate operation of the 1508 Club is in effect an attempt to confer subject matter jurisdiction on the court below. A stipulation is merely an evidentiary consent and it is well settled that parties cannot confer subject matter jurisdiction by consent. Because interstate commerce activity is an essential element of RICO, it constitutes a fact having legal significance established by the statutory provisions set forth by Congress. It is there-

fore a subject to which no stipulation can be made. See *Platt v. United States*, 163 F.2d 165 (10th Cir. 1947). Appellant should not be tried in a United States District Court on conduct which clearly does not offend the laws of the United States and no stipulation may is cognizable which attempts to convey subject matter jurisdiction upon a federal court.

V. THE DISTRICT COURT ERRED IN HOLDING THAT THE APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON DIRECT APPEAL

In denying Appellant's claim that he was denied the effective assistance of counsel, the District Court below stated that:

> "A review of the entire record in this case reaffirms this Court's impression that defendant Webster received the assistance of a highly experienced criminal defense attorney whose representation in the instant case has met the recognized standards of quality and effectiveness. Webster's motion to vacate based on ineffective assistance of counsel will, accordingly, be denied." *U.S. District Court Memorandum and Order, p. 7.*

The Supreme Court's decision in *Kimmelman v. Morrison, supra* requires this Court to reverse the District Court.

The District Court characterized Appellant's counsel's representation as meeting "the recognized standards of quality and effectiveness". But the very facts as set forth by his 2255 claims requires this Court to reverse the lower court's decision and find that Appellant's trial counsel and appellate counsel provided performances below the accepted standard. *De novo* Review of Appellant's 2255 claims will persuade this Court that, but for

attorney error, the outcome of Appellant's trial would probably have resulted in a judgment of acquittal as to the CCE Count (Count 34).

Appellant argued in the District Court below, and the government conceded, that the trial court's instruction did incorrectly identify Sharon Gilliam as an accomplice and that such instruction was error. Notwithstanding the fact that the law holds that "[a] verdict, if based on an instruction that allows it to convict without properly finding the facts supporting each element of the crime, is error", *see Sandstorm v. Montana,* 442 U.S. 510 (1979), Appellant had a right to have his trial counsel object to the use of the court's erroneous instruction which clearly identified Sharon Gilliam as Appellant's accomplice. Failure to object caused Appellant to be subject to a guilty decision with Sharon Gilliam considered as one of the five or more persons under Appellant's supervision or management. Sharon Gilliam was neither a member of the conspiracy nor a co-defendant at Appellant's trial. Failure to object to the instruction prejudiced Appellant by denying him a fair jury trial.

Further, because it is well settled law that the jury must be unanimous in its decision as to determinations of guilt or innocence in criminal trials, Appellant was entitled, as a matter of law, to have the judge at trial to charge the jury with a specific unanimity instruction as to the identity of the five persons who were found to be under his management or supervision for CCE purposes. Because Sharon Gilliam and Herbert Leon Johnson were obviously improperly countered by the jury as one of the five, the unanimity instruction is clearly appropriate for constitutional reasons. If either Gilliam or Johnson were counted by some of the jurors as being among the five persons under Appellant's supervision or manage-

ment for CCE purposes, the CCE conviction against him would have to be reversed as a matter of law. ". . .Often times, the government will be able to establish that an individual's place in the hierarchy or structure of the organization establishes his direction of five or more people. . . However, when the government, as here, does not rely on such an approach and instead chooses to rely on the activity of specific individuals, it must submit sufficient evidence to permit a rational jury to conclude that each of those individuals had been directed by the defendant." See *United States v. Alvarez*, 860 F.2d 801, 817-18 (7th Cir. 1988). The Supreme Court of the United States held that:

> "With respect to findings of guilt on criminal charges, the court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g. *Yates v. United* States, 354 U.S. 298, 312 (1957); *Stromberg v. California*, 283 U.S. 359, 367-368 (1931)."
> See *Mills v. Maryland*, _____ U.S. _____, (No. 87-5367) (Slip Opinion) (Decided June 6, 1988).

If the specific unanimity instruction had been given to the jury and had Sharon Gilliam or Herbert Leon Johnson been included as part of the five persons, Appellant's CCE conviction clearly would have to be reversed as a matter of law. Therefore, failure to request the specific unanimity instruction at trial constitutes either ineffective assistance of counsel under the standards enunciated in *Strickland v. Washington, supra* or plain error.

CONCLUSION

WHEREFORE, on the basis of the foregoing, the District Court should be reversed where it has denied the Motion to Vacate and Set Aside Appellant's CCE and RICO convictions under 28 U.S.C. 2255. This case should be remanded to the District Court for consideration of Appellant's issues on the merits and for appropriate determination, or, in the alternative, this Court should afford Appellant's 2255 claims *de novo* review on the merits and reverse the convictions on the CCE and RICO Count of the Indictment and further vacate and set aside the sentences imposed therefor.

Respectfully submitted,

/s/ R. K. Mundy

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, to Geoffrey Robert Garinther, Assistant United States Attorney, 101 W. Lombard Street, Baltimore, Maryland on this 1st day of May, 1990.

/s/ R. K. Mundy
R. KENNETH MUNDY

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-6784

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

WALTER R. WEBSTER, a/k/a Gangster,
a/k/a Mr. G, a/k/a G,

Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, Senior District Judge. (CR-79-60-Y, CA-88-3780-Y)

Argued: October 6, 1990 Decided: November 8, 1990

Before WIDENER and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ARGUED: R. Kenneth Mundy, Washington, D.C. for Appellant. Richard Charles Kay, Assistant United States Attorney, Baltimore, Maryland, for Appellee. ON BRIEF: Breckinridge L. Willcox, United States Attorney, Geoffrey R. Garinther, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Appellant brought this action under 28 U.S.C. §§ 1651, 2202 and 2255 seeking to set aside and vacate certain criminal sentences imposed following his May 1979 convictions of conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848, conducting the affairs of the enterprise through a pattern of racketeering in violation of 18 U.S.C. §§ 1961, 1962(c), and 1963, conspiracy to distribute cocaine and heroin in violation of 21 U.S.C. § 846, 17 counts of illegal use of the telephone in violation of 21 U.S.C. § 843(b) and (c), and three counts of interstate travel in aid of a racketeering enterprise in violation of 18 U.S.C. § 1952 (a) (3). As a part of the conviction and sentencing order, the district court provided that it would set aside the 17 counts of illegal use of the telephone as having merged into the greater sentence imposed under Count 2, the conspiracy count. On appeal (*United States v. Webster*, 639 F.2d 174 (4th Cir. 1981), *cert. denied*, 456 U.S. 935 (1982)), all convictions were affirmed except the conspiracy conviction under Count 2. It appears that the conviction on Count 2 has never been

stricken as directed by our opinion in 1981, and in the present proceeding the district court directed the record to be corrected and this conviction stricken. However, the district court denied Webster's further request that the 17 convictions of illegal use of the telephone be set aside. There is no merit to appellant's claim of error as to these 17 convictions. The district court at sentencing clearly provided that the telephone convictions would be vacated if the conspiracy count was affirmed. However, since the conspiracy count was not affirmed, appellant is not entitled to be relieved of the convictions.

Appellant also attempted to raise challenges to the sufficiency of the evidence and erroneous jury instructions to his CCE and RICO convictions and claims that his failure to raise these exceptions on direct appeal was the result of ineffective assistance of counsel. However, he has failed to make a showing of cause and actual prejudice as required by *United States v. Frady*, 456 U.S. 152 (1982). Ineffective assistance of counsel may not be used to establish cause under the *Frady* test.

The district court considered the ineffective assistance of counsel claim and found that appellant had not met the burden imposed by *Strickland v. Washington*, 466 U.S. 668 (1984), and we find no error in this ruling.

AFFIRMED